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No. 01-

IN THE

Supreme Court of the United States

MICHAEL ABBELL AND WILLIAM MORAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 23(b) and the Sixth Amendment's guarantee of a verdict by an impartial, unanimous jury prohibit the discharge of a deliberating holdout juror through a process in which the court (i) questions all members of a jury about their deliberations, and (ii) makes credibility determinations and subjectively decides – based on a patently ambiguous record of those deliberations – that there is no "substantial possibility" that the juror is being discharged for her views about the merits of the Government's case.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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PETITION FOR CERTIORARI

Petitioners, Michael Abbell and William Moran, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-29a) was entered on November 7, 2001, and is reported at 271 F.3d 1286 (11th Cir. .2001). The order denying petitioners' petitions for panel rehearing and rehearing en banc (App. 60a-62a) was entered on February 5, 2002, and is not reported. The opinion of the United States District Court for the Southern District of Florida denying petitioners' motion for a new trial (App. 36a-59a) was entered on May 5, 1999, and is not reported.

JURISDICTION

The court of appeals entered its opinion and judgment on November 7, 2001. Petitioners timely filed petitions for panel rehearing and rehearing en banc which were denied on February 5, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

Federal Rule of Criminal Procedure 23(b) provides:

> (b) **Jury of Less Than Twelve.** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

INTRODUCTION

In 1983, Federal Rule of Criminal Procedure 23(b) was amended to authorize a district court to excuse a deliberating juror for "just cause" and to allow the remaining jury of 11 to return a verdict. The purpose of the amendment was to avoid the burdens of mistrial when, after deliberations have commenced, "one of the jurors is seriously incapacitated or otherwise found to be unable to continue service upon the jury." Advisory Committee Notes to 1983 Amendment to Rule 23(b). Since 1983, the courts have comfortably and unanimously excused jurors for "just cause" based on illness, incapacity or improper external influence. The courts of appeals, however, are in conflict on the important and recurring question raised by the application of Rule 23(b) where jurors allege that another juror is refusing to follow the court's instructions during deliberations. Specifically, they disagree about both (i) the proper process for investigating such allegations; and (ii) the standard by which evidence of such allegations should be assessed.

In order to protect the secrecy of jury deliberations and an accused's constitutional right to a verdict from an impartial, unanimous jury, the Second, D.C., and Ninth Circuits have

held that a district court confronted with allegations that a juror is refusing to follow the court's instructions may *not* conduct a broad probe of the jury's deliberations. In addition, these courts conduct an *objective* examination of the record to determine if there is "any possibility" or "any reasonable possibility" that the discharge request arose because the juror was unpersuaded by the government's case. *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997); *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987); *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999). In this case, the Eleventh Circuit, in marked contrast, authorized a sweeping and disruptive intrusion into deliberations and allowed the district court *subjectively* to weigh conflicting evidence in the record and make credibility determinations. Moreover, the court held that a discharge is permissible unless there is "substantial evidence" that the request to discharge arose from the juror's view of the sufficiency of the evidence. App. 25a. Thus, the Eleventh Circuit affirmed the discharge of a deliberating juror on an indisputably ambiguous record. There is no doubt that the Second, D.C., and Ninth Circuits would have vacated the convictions at issue and granted a new trial based on the district court's intrusion into the deliberative process and its use of a subjective evaluation of the conflicting testimony of individual jurors as the basis for discharging a holdout juror.

The Eleventh Circuit's approach is also wholly inconsistent with this Court's decisions mandating the preservation of the secrecy of jury deliberations. In several contexts – including a trial judge's inquiry about a deliberating jury's numerical split, the admission of post-verdict juror testimony about internal juror misconduct, and the presence of alternate jurors during deliberations – this Court has made clear that the general "tendency" of judicial inquiries about the status of the jury's deliberations is "coercive" and "is not to be sanctioned." *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926). Moreover, additional "long recognized and very

substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner* v. *United States*, 483 U.S. 107, 127 (1987). This authority leaves no room for the juror interrogations conducted by the district court here.

This Court has never addressed the scope of Rule 23(b). It should intervene to resolve the conflicting applications of the Rule in this important context, to eliminate the Eleventh Circuit's utilization of a process inconsistent with this Court's precedents and the constitutional rights at issue, and to preserve the secrecy of jury deliberations.

STATEMENT OF THE CASE

1. In an indictment filed in 1996, the government charged petitioners and 73 co-defendants with (a) participating in a RICO conspiracy (Count I); (b) engaging in substantive RICO violations (Count II); (c) participating in a conspiracy to import cocaine (Count III); (d) participating in a conspiracy to import and distribute cocaine (Count IV); and (e) participating in a conspiracy to launder money (Count IX). After a five-month trial, petitioners were acquitted of Count II; but the jury was unable to reach a verdict on the other counts, and a mistrial was declared.

A second trial commenced in 1998. This petition concerns the jury deliberations for that trial. The jury began deliberating on July 1, 1998. On July 9, 1998, after approximately 20 hours of deliberations, the court received a note from the jury forewoman Sebastian and Juror Gooden claiming that another juror (later determined to be Juror Alfonso) "had 'formed an unwavering opinion – prior to, in[ ]spite . . . of and []regardless . . . of the evidence presented'" and that Juror Alfonso was "unwilling or unable to review, read, or view exhibits" that were contrary to that opinion. App. 37a.

Over objection, the court interrogated Forewoman Sebastian about the note. She testified that Juror Alfonso had

expressed her views "'right at the beginning of deliberations.'" App. 38a, 64a-65a. She also testified that Juror Alfonso had said that RICO is "'a stupid law and we don't have to regard it'" and expressed her "opinion" that Juror Alfonso had not engaged in "meaningful deliberations." *Id.* at 38a, 71a.

Again over objection, the court instructed the jurors that jury nullification of the law is "not legal" and that they had a duty to follow the law. App. 38a, 75a. The jurors were also instructed that if any among them was unable to follow the law, he or she should send a note to the court and there would be no recrimination. *Id.* at 38a.

On July 13, 1998, the court received an unsigned note stating that the jury was "hopelessly deadlocked." App. 77a, 39a. The court returned the note for signature, and it returned co-signed by Forewoman Sebastian and Juror Alfonso. *Id.* Petitioners again moved for a mistrial. The court denied the motion, emphasizing the months spent on the trial and the "enormous expense for the government," and stating: "I guess that's my way of saying I am not going to let this case go down easily." *Id.* at 78a. But, before the court could respond to the note, it received a further note signed by Forewoman Sebastian and nine other jurors stating that it was "'the consensus of the rest of the jurors'" that they were not hopelessly deadlocked. *Id.* at 39a.

Over renewed objections, the court again questioned Forewoman Sebastian. She testified that the jury had not been exposed to any extraneous matters and that Juror Alfonso had not made any further comment indicating an unwillingness to follow the law subsequent to the judge's reinstruction. App. 81a-82a. The court again asked Forewoman Sebastian whether the jurors were all "deliberat[ing]," and she stated her opinion that Juror Alfonso was not. *Id.* at 81a.

The government urged the court to question all jurors about Juror Alfonso's alleged misbehavior. Although the court initially indicated that that could lead to "sure fire reversal," it ultimately summoned Juror Gooden, author of the first note. Tr. 8731; App. 83a. When asked whether Juror Alfonso was deliberating, he responded that perhaps the instructions were "not simple enough" and that Juror Alfonso said she was "'having a hard time understanding [RICO].'" *Id.* at 39a, 86a-87a.

On July 14, 1998, the government again requested Juror Alfonso's removal. Over objection, the court questioned Forewoman Sebastian a third time. She again stated her belief that Juror Alfonso was not "deliberating." App. 40a, 89a-90a.

Thereafter, the court interrogated the remaining jurors. In response to queries from the judge as to whether Juror Alfonso was deliberating, Jurors Grant and Butler testified that all jurors, including Juror Alfonso, were "debating" and "participating" in deliberations. App. 42a, 45a, 117a, 146a. Juror Doll expressly testified that Juror Alfonso had "discusse[d]" the case with other jurors and actively stated her opinion, explaining in response to further questions that although Juror Alfonso had not "said anything this morning," she was "alert and looks around and listens." *Id.* at 99a. Asked whether Juror Alfonso was deliberating, Juror McSwiggan testified "somewhat" and "yes," although she "had her back up" and "really didn't want to participate much," *id.* at 92a-93a, 40a. Juror Peralta answered "yes" and "50/50 . . . . Some days yes, some days no" to the same question. *Id.* at 131a. Jurors Mandall and Cortes both stated that while Juror Alfonso did not engage in much "verbal participation," she did "appear to be listening" although she was not changing her votes on anything. *Id.* at 123a, 139a. Juror Blanton testified that Juror Alfonso had spoken for "over an hour" during deliberations prior to the court's reinstruction, and expressed the view that following the

reinstruction, Juror Alfonso had only "pretended" to deliberate "a few times." *Id.* at 40a, 95a-96a. See also *id.* at 43a (Juror Mandall testimony characterizing Juror Alfonso as giving "'lip service that she is willing to'" listen).

The jurors unanimously testified that following the court's reinstruction, Juror Alfonso had not repeated her statement that she would not follow the court's instructions. App. 155a. Indeed, Juror Mandall testified that even before the court's re-instruction, Juror Alfonso had told the jurors that "she was willing to listen to the law," and that, after the instruction, she said she could "participate in the process." *Id.* at 121a-122a. Juror Butler indicated that Juror Alfonso "keeps insisting that she's following the law." *Id.* at 148a.

In the course of interrogating the other jurors, the court interrogated Juror Alfonso. She denied that she had the right to ignore the law. App. 111a. She testified that she had "been following the law," but did not believe that meant she had to "change [my vote] to please the others," *id.* at 113a. When asked to explain her initial criticism of the law, she testified repeatedly that the law was "not the only thing I have to follow," because the instructions were "not everything here. We have to take into consideration the testimony of the witness[es], this, this, this and that." *Id.* at 102a-103a. See *id.* at 108a ("I don't have to follow only the law. I have to use my common sense. I have to use – I have to – the testimony, you know"); *id.* (the law should give way if she had "a doubt, any reasonable doubt").

Juror Alfonso also testified that "I [have] been reading like everybody else through the evidence. I've been giving my point of views . . . ." App. 104a. She explained that "[s]ome other people from the moment one voted this way. They haven't changed." *Id.* She explained that Juror Blanton was exerting control over the jury: "Everybody that doesn't agree with his point of view has to go through that [explaining him or herself]" and that he told her that if she caused a mistrial, she was "going to have to face the press and tell the press

why" she did not vote to convict. *Id.* at 110a, 102a. (Jurors Butler, Grant and Russo confirmed that Juror Blanton was making "threats." *Id.* at 118a, 138a, 146a.) Critically, Juror Alfonso stated that she was "following the law" but did not agree with the other jurors: "You are telling me that I cannot agree with you so I am not following the law." *Id.* at 113a, 114a-115a. See *id.* at 42a (in response to the court's query whether the law is "'just advisory,'" Juror Alfonso stated "'[e]xactly like that, no, Judge. I say [sic], "This is not everything". . . . We have to take into consideration a lot of things here.'") (alterations and omission in original).

While the decision concerning Juror Alfonso's dismissal was pending, the court received two additional notes from the jury, signed only by Forewoman Sebastian and inquiring (1) whether the defense had a right to review seized evidence, and (2) whether the jurors could have a copy of the testimony of Douglas Hartman, a defense witness. Unbeknownst to the judge, Forewoman Sebastian had sent the second note at the request of Juror Alfonso. App. 45a, 46a.

Before recessing for the day, the court received yet another note, this time from Juror Grant, stating "'I quit.'" App. 45a. The court indicated that this juror was "on the verge of tears." Tr. 9052. After she complained of mistreatment, she was sent home for the day to compose herself. App. 151a. Forewoman Sebastian was again summoned to testify and she indicated that unnamed jurors had been "zealous in trying to explain the deliberation process" to Juror Grant. *Id.* at 152a.[1] Forewoman Sebastian again expressed her view that everyone was participating in the "give and take," except Juror

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[1] The next day the court interrogated Juror Grant who said she had been verbally abused because she was "not going the way they want me to go." App. 156a-157a; *see also id.* at 158a-159a (inquiring how much longer she had to stay "there and disagree" and stating that she did not "want to get in trouble"). Ultimately, she agreed to continue deliberating. *Id.* at 46a.

Alfonso. In so testifying, she did not reveal that Juror Alfonso had made the request to review witness Hartman's testimony. *Id.* at 153a.

Despite the absence of evidence that Juror Alfonso refused to follow the law following the court's reinstruction and the fact that "[it is] the almost invariable assumption of the law that jurors follow their instructions," *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987), the district court nonetheless decided that Juror Alfonso was not abiding by its instructions. Accordingly, the next day the court dismissed Juror Alfonso, stating that although the court "accept[ed]" that she had been deliberating, it believed she had "apparently made up her mind that she can do pretty much what she feels like doing regardless of what the law is." App. 155a. The court then explained to the jury that Juror Alfonso had been dismissed due to "her views of the jury process and also her own feelings . . . . It is just because I think in her view of what the law is or isn't, she just was unable to serve as a juror in this case." *Id.* at 161a-162a. The court stated that the dismissal had "'absolutely nothing to do with how I may view this case'" and asked each juror whether he or she could continue fair and impartial deliberations. *Id.* at 46a.

On July 20, 1998, the remaining 11 jurors found petitioners guilty of the RICO and money-laundering concealment conspiracy charges (Counts I and IX). To engage in money-laundering concealment, a defendant must conduct a transaction with knowledge and the intent to "conceal" or disguise the nature, location, the source, the ownership, or the control of the proceeds of unlawful activity. 18 U.S.C. § 1956(a)(1)(B)(i). Petitioners' convictions were based on transactions in which their law firms openly issued money orders or paid assistance money to clients in jail or the families of such clients; billed Miguel Rodriguez-Orejuela ("Rodriguez"), a leader of the so-called Cali Cartel who was paying the clients' fees; and maintained records of these transactions. These actions were concededly unconcealed, and

petitioners denied any knowledge that Rodriguez's payments were the proceeds of unlawful activity. The jury was unable to reach a verdict on the two drug conspiracy counts.

2. Petitioners filed motions for a new trial and motions for a judgment of acquittal on all counts. In support of the former motion, they asserted that the decision to strike Juror Alfonso and the process used to determine whether to strike her violated Federal Rule of Criminal Procedure 23(b) and petitioners' constitutional right to a unanimous verdict by an impartial jury. The court denied the new trial motions on May 5, 1999. App. 59a. Ironically, in rulings that appear to reflect Juror Alfonso's view of the government's case, the court also held that no rational juror could have found petitioners guilty on either the RICO or drug conspiracy counts and entered judgments of acquittal on those counts. *Id.* at 33a, 3a. The court refused, however, to acquit petitioners of the money-laundering concealment conspiracy charge.

Pertinent here, the trial court held that Juror Alfonso should be excused for "just cause" under Fed. R. Crim. P. 23. The court asserted that it had "'broad discretion' in determining the proper investigative procedure to be used when faced with an allegation of juror bias or misconduct." App. 49a. The court acknowledged that the "nature of the alleged misconduct dictates the scope of the court's investigation" and that courts must proceed cautiously when such an investigation would require intrusion upon the jury's deliberations. *Id.* at 50a. Nonetheless, the court concluded that the scope of its investigation – *viz.*, the interrogation of all jurors, some more than once – was permissible.

In addition, the court decided that Juror Alfonso was properly excused for "misconduct" based on her statements during deliberations that she had a "'problem with the federal law [RICO]'" and other jurors' testimony that Juror Alfonso had indicated that she did not have to follow the law. App. 54a. The court did not address the jurors' unanimous

testimony that Juror Alfonso had not repeated that sentiment following the court's reinstruction or many jurors' testimony that Juror Alfonso had been engaged in deliberations since the court's reinstruction. Nor did the court accept Juror Alfonso's testimony that her votes were based on the evidence.[2] Instead, the court concluded that Juror Alfonso "did not intend to apply the law as set forth in [the court's] instructions" and "that the record does not reveal a 'substantial possibility' that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to RICO conspiracy." *Id.* at 56a, 55a.

In a related point, the court concluded that it was not dismissing "the sole holdout for acquittal," based on Juror Alfonso's testimony and Juror Grant's testimony. App. 57a. The court did not consider the coercive effect that its interviews and dismissal of Juror Alfonso, one of two apparent holdouts for acquittal, might have had on Juror Grant and the jury as a whole.

Finally, the court justified its decision by stating that "it is proper to consider the length of time invested in a proceeding when determining whether dismissal of a juror is necessary." App. 57a-58a. The court pointed out that this had been a long trial, and expressed its reluctance to cause a further expenditure of prosecution, defense and court resources. *Id.*

3. Petitioners appealed the denial of their motions for a new trial and the convictions for money-laundering concealment conspiracy to the Eleventh Circuit. The court of appeals first acknowledged that "[n]o evidence shows that the pertinent transactions ended up creating the appearance of legitimate wealth for Rodriguez[]." App. 17a. The court recognized that the money laundering statute is "'designed to

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[2] The court appears to have concluded, based on Juror Butler's testimony about the deliberations, that Juror Alfonso "felt that her position in law enforcement (as a corrections officer) provided her with sufficient knowledge to disregard the federal law." App. 56a.

punish defendants who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises.'" *Id.* The court further acknowledged that "[t]he facts here do not appear to be that kind of case," because the law firms did not conceal and, indeed, openly maintained records reflecting that Rodriguez was the source of the funds at issue, *id.* The court nonetheless upheld the conviction on the rationale that the transactions benefited Rodriguez and concealed that he was the source of the funds, *id.* at 18a-19a.[3]

This decision required the court to confront the district court's denial of petitioners' motion for a new trial. The court of appeals held that the district court did not abuse its discretion by dismissing Juror Alfonso for "just cause" under Fed. R. of Crim. P. 23(b), after other members of the jury accused her of refusing to apply the law. The court first decided that in such circumstances, "a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." App. 25a. It explained that it meant "for this standard to be basically a 'beyond reasonable doubt' standard." *Id.* The court further approved the district court's investigation of Juror Alfonso's statements and conduct during the deliberations and held that

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[3] The government cross-appealed the judgment of acquittal on the RICO conspiracy charge, and the court of appeals reversed. It held that the government had proven that petitioners engaged in predicate acts related to money laundering and obstruction of justice sufficient to support the RICO conspiracy convictions. The court acknowledged that a person does not engage in obstruction of justice unless his acts have the natural and probable effect of interfering with a judicial proceeding and assumed that Rodriguez could not be extradited (in light of the extradition prohibition in the Colombian constitution), but nonetheless found that it was possible that the affidavits at issue could be involved in some future proceeding against Rodriguez. App. 22a-23a. On the basis of that speculation, which was inconsistent with this Court's decision in *United States* v. *Aguilar*, 515 U.S. 593, 598-601 (1995), the court reinstated the RICO conspiracy convictions.

"because the demeanor of the pertinent juror is important to juror misconduct determinations, the district court is uniquely situated to make the credibility determinations that must be made in cases like this one: where the juror's motivations and intentions are at issue." *Id.* at 26a.

The court acknowledged that after the trial court's reinstruction on "the jury's duty to apply the law and to obey the court's instructions," Juror Alfonso "made no more direct statements about her intention not to follow the law." App. 27a. Moreover, although several jurors testified in response to the judge's questions that Juror Alfonso was deliberating and although Juror Alfonso's testimony made clear that she had doubts about the government's case based on the evidence, the court of appeals accepted the view of a "majority of the jurors" who believed that Juror Alfonso was not deliberating (although the district court had not done so). *Id.* In addition, the court of appeals stated that Juror Alfonso's "own testimony on her commitment to follow the law was not certain." *Id.* at 28a. The court of appeals thus held that "the record supports the district court's skeptical view of Juror Alfonso's answers to its questions and that the district court's findings about Alfonso's intentions are supported by the record." *Id.*

Finally, the court of appeals rejected petitioners' assertion that the district court's interrogation of each juror and ultimate dismissal of Juror Alfonso "so tainted the jury pool as to make a fair trial impossible." App. 27a n.20. The court stated that "[t]o find much fault with the inquiry in this case would unduly hinder a district court's ability to detect and rectify a juror's refusal to obey her duty in applying the law to the case and obeying the court's instructions." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN CONFLICT ABOUT THE APPLICATION OF FED. R. CRIM. P. 23(B) WHEN A JUROR IS ACCUSED BY OTHER JURORS OF REFUSING TO FOLLOW THE COURT'S INSTRUCTIONS.

In 1983, the Federal Rules of Criminal Procedure were amended to authorize district courts to dismiss a juror for "just cause" even after deliberations have commenced and to allow a valid verdict to be returned by a jury of 11. Since then, jurors have been dismissed for just cause based on unavailability (due to illness or other reasons), mental or physical impairment, exposure to external sources of influence or bias, misconduct *prior* to deliberations, and self-proclaimed refusal to follow the law, because such claims can be resolved without delving into the jury's deliberations.[4]

The courts of appeals, however, do not agree on the standard and process for assessing when and whether a deliberating juror may be discharged for just cause based on *other jurors'* allegations that he or she is refusing to follow the court's instructions. The lower courts are conflicted about both (i) the process that may be used to investigate accusations of internal juror misconduct related to the merits of a case, and (ii) the standard by which such allegations

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[4] *See, e.g., United States* v. *Reese*, 33 F.3d 166, 172-73 (2d Cir. 1994) (juror leaving on business trip); *United States* v. *Armijo*, 834 F.2d 132, 134 (8th Cir. 1987) (juror in serious car accident); *United States* v. *Huntress*, 956 F.2d 1309, 1312-13 (5th Cir. 1992) (juror's doctor states that juror's mental condition rendered juror unable to deliberate); *United States* v. *Gabay*, 923 F.2d 1536, 1541-43 (11th Cir. 1991) (pre-deliberation misconduct, to wit, pre-deliberation statements regarding view of the case); *United States* v. *Casamento*, 887 F.2d 1141, 1186-87 (2d Cir. 1989) (juror fearful after threatening phone call to her daughter); *United States* v. *Geffrard*, 87 F.3d 448, 451 (11th Cir. 1996) (discharging juror who stated that her religious beliefs forbid her to return a guilty verdict).

should be assessed. The Second Circuit, D.C. Circuit, and Ninth Circuit have made it clear that a district court confronted with allegations of such juror misconduct may not question jurors during deliberations about the substance of those deliberations. In addition, and in further protection of the jury's deliberations, these courts of appeals apply an objective test to the evidence of alleged internal misconduct to determine whether there is "any possibility" or "any reasonable possibility" that the juror is being discharged based on his or her views of the merits of the case. Applying this approach, these three circuits have reversed trial court decisions discharging jurors who allegedly refused to obey the court's instructions.

In marked contrast, the Eleventh Circuit here authorized the interrogation of all 12 jurors about deliberations, some more than once, to assess whether internal juror misconduct occurred. It refused to require the district court objectively to assess whether there is any possibility that the juror is being discharged based on his or her views of the merits of the case. Instead, the Eleventh Circuit upheld the district court's authority to make credibility determinations despite competing accounts by jurors in deciding that "no 'substantial possibility' exists that [the discharged juror] [wa]s basing her decision on the sufficiency of the evidence." App. 25a.

The Second Circuit has expressly recognized that:

> Once a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important – safeguarding the secrecy of jury deliberations. This conflict is especially pronounced . . . where the alleged misbehavior is a purposeful disregard of the law, a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken. [*Thomas*, 116 F.3d at 618].

Moreover, the court acknowledged, where "a presiding judge receives reports that a deliberating juror is intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations." *Id.* at 621. "[T]o determine whether a juror is bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought processes." *Id.*

To protect the integrity of the deliberative process, the Second Circuit took two related steps: It held that "in any case where the juror allegedly refuses to follow the law," a juror may not be discharged "'if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence.'" *Id.* at 621-22 (emphasis omitted). It justified this rule as necessary "to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations":

> A presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions. A lower evidentiary standard would encourage the court faced with ambiguous evidence of such impropriety to investigate further, eliciting testimony from jurors until enough evidence surfaced to affirm or reject allegations of juror nullification. One unavoidable consequence of imposing a lower evidentiary standard would thus be to open up the possibility that judges, in response to demands of counsel or otherwise, would wind up taking sides in disputes between jurors on allegations of juror nullification – in effect, to permit judicial interference with, if not usurpation of, the fact-finding role of the jury. [*Id.* at 622.]

Cf. *id.* at 620 ("the very act of judicial investigation can at times be expected to foment discord among the jurors"). See also *United States* v. *Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988) (error to discharge juror when "it is not clear in the record that the removal was because of mental incompetence rather than to avoid a hung jury"); *United States* v. *Baker*, 262 F.3d 124, 132 (2d Cir. 2001) (disapproving district court's question "'Do you feel that the defendants were unfairly prosecuted here?'" because it "sent the inquiry unnecessarily in the direction of the juror's view of the merits").

Under this approach, the Second Circuit considered the record – one juror's testimony that the discharged juror's (Number 5) position was based on the fact that "the defendants were his 'people,'" another's that it was juror 5's belief that defendants were "good people," two others' that it was based on his belief that "drug dealing is commonplace," two others' that it was based on his belief that they "had engaged in the alleged criminal activity out of economic necessity," while still others, including juror 5 himself, testified that juror 5 was relying on the evidence. *Thomas*, 116 F.3d at 611. The court did *not* assess the relative credibility of the jurors, but held that it "cannot say that it is beyond doubt that Juror No. 5's position during deliberations was the result of his defiant unwillingness to apply the law, as opposed to his reservations about the sufficiency of the Government's case against the defendants." *Id.* at 624.

The D.C. Circuit's approach is in accord with that of the Second Circuit. In *Brown*, the trial court dismissed a juror who asked to be discharged based on his "'disagree[ment]'" with RICO and "'how it runs'" and "'the way [the RICO law is] written and the way the evidence has been presented.'" 823 F.2d at 594. The court indicated that in such cases, it had to "confront the problem that the reasons underlying a request for a dismissal will often be unclear" and that "a court may not delve deeply into a juror's motivations because it may not intrude upon the secrecy of the jury's deliberations." *Id.* at

596. Thus, the court concluded, "*unless the initial request for dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it.*" *Id.* (emphasis supplied). As a result, the court held "that if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Id.* (citing *United States* v. *Essex*, 734 F.2d 832, 843 (D.C. Cir. 1984) (finding a violation of the defendant's right to a unanimous jury because there was a "'possibilit[y]' that the absent juror was a 'lone holdout for innocence in the face of a hostile pro-conviction majority,'" *id.* (alteration in original)). Again, the court did not purport to assess the juror's credibility, but simply concluded that the juror's response, noted above, "create[d] an ambiguous record," *id.* at 597, and therefore it had been error to discharge him.

In *United States* v. *Symington*, the Ninth Circuit, too, concluded that in light of the strong interest in protecting jury deliberations, "where a request for juror dismissal focuses on the quality of the juror's thoughts about the case and her ability to communicate those thoughts to the rest of the jury, 'the court will likely prove unable to establish conclusively the reasons underlying' the request for dismissal." 195 F.3d at 1086 (quoting *Brown*, 823 F.2d at 596). The court thus held that "if the record evidence discloses any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." *Id.* at 1087 (emphasis omitted). That rule, the court explained, is "attentive to the twin imperatives of preserving jury secrecy and safeguarding the defendant's right to a unanimous verdict from an impartial jury." *Id.* The court did not assess relative juror credibility, but simply concluded that "while there may have been some reason to doubt Cotey's abilities as a juror, there was also considerable evidence to suggest that the other jurors' frustrations with her derived primarily from the fact that she held a position

opposite to theirs on the merits of the case" and that those frustrations "manifest[ed] themselves in concerns about [her] reasonableness or general capacity as a juror." *Id.* at 1088.[5]

The Eleventh Circuit's approach is flatly inconsistent with that taken by the Second, D.C. and Ninth Circuits. After 20 hours of deliberations, based on a note from two jurors that another juror had made up her mind about the case, the district court commenced an investigation that consumed four days and entailed detailed, sometimes multiple interviews, of all jurors, in which they were asked about Juror Alfonso and Blanton's statements and opinions and about their own opinions of the deliberations and other jurors' conduct. In light of the patent ambiguity of the record at its commencement and as it developed, the court of appeals' approval of the interrogation of all jurors was unlawfully intrusive under the rule of *Thomas*, *Brown* and *Symington*. The questioning probed the substance and the process of the jurors' deliberations and, in addition, required the jurors to reveal mental impressions and opinions concerning the course of deliberations.

It is equally clear that the Eleventh Circuit did not objectively assess the record to determine whether there was "any possibility" or a "reasonable possibility" that Juror

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[5] *See also Garcia* v. *People*, 997 P.2d 1, 7 (Colo. 2000) (holding that the "trial court impermissibly invaded the jury's deliberations" by interviewing the foreperson about complaints that a juror was refusing to follow the court's instructions because "'the mental processes of a deliberating juror . . . must remain largely beyond examination and second-guessing, shielded from the court as much as from the eyes and ears of the parties and the public'"); *State* v. *Valenzuela*, 643 A.2d 582, 589 (N.J. 1994) ("[t]he record on which a court may excuse a deliberating juror must reveal with greater clarity that a juror cannot proceed with deliberations and fulfill the function of a juror, particularly when the record contains any suggestion that the problems regarding the juror stem from interactions with the other jurors and not from circumstances 'exclusively personal to the juror in question'").

Alfonso was discharged based on her minority view of the evidence. As the Second, D.C., and Ninth Circuit decisions prohibiting intrusion on the deliberative process make clear, this assessment should be analogous to the assessment made in deciding a motion for a directed verdict under Fed. R. Civ. P. 50 – to wit, the judge should inquire whether there is sufficient evidence for a reasonable jury to rule in favor of the non-moving party *without "mak[ing] credibility determinations or weigh[ing] the evidence."* *Reeves* v. *Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150 (2000) (emphasis supplied). Thus, when faced with allegations that a juror is refusing to follow the law, the judge should ask the *legal* question whether the evidence would persuade any reasonable person that the juror is being discharged based on his or her views of the merits of the government's case. In this case, however, the trial court erroneously believed that the proper inquiry was whether the conflicting evidence persuaded him.

Here, while several jurors subjectively believed that even after the court's anti-nullification instruction, Juror Alfonso was not following the court's instructions, other jurors testified to the contrary, and all jurors testified that after the re-instruction, Juror Alfonso never said she did not have to follow the court's instructions. Moreover, as noted *supra* at 9, jurors are presumed to follow the court's instructions. Juror Alfonso accurately testified both that she was following the law and that she was following the court's express instruction to apply her common sense and life experiences to the testimony. Nonetheless, although it recognized the deep ambiguity of the record, the court of appeals allowed the district court to make *credibility* judgments among jurors and hence to discredit the testimony of Juror Alfonso and that of the jurors corroborating her testimony, and then compounded its error by affording complete deference to the district court's subjective assessment of the record. App. 25a-26a. In addition, the court of appeals made it easier to uphold the dismissal of a holdout juror. It allowed discharge unless the

record demonstrates that there is no "'*substantial possibility*'" that the discharge was based on the juror's view of the merits of the case.[6] *Id.* at 25a. (emphasis supplied). That approach – with its subjective assessment of the record and lenient standard for discharge – is the antithesis of the objective, stringent approach of the other courts of appeals.[7]

This Court should grant the petition and resolve the conflict among the courts of appeals.

II. THE COURT OF APPEALS' DECISION IS IN TENSION WITH DECISIONS OF THIS COURT.

The right of a federal criminal defendant to a unanimous verdict by an impartial jury is embodied in the United States Constitution, and that constitutional right is secured by secret jury deliberations. "The integrity of jury proceedings must not be jeopardized by unauthorized invasions." *Remmer* v. *United States*, 347 U.S. 227, 229 (1954). See also *Tanner*, 483 U.S. at 120 (describing the "weighty government interest in insulating the jury's deliberative process"). In several contexts, this Court has unanimously recognized "'the

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[6] The Eleventh Circuit stated that the *Brown* court also employed a "substantial possibility" standard, *see* App. 25a n.14, but that is wrong. The *Brown* court used that phrase only as an assessment of the weight of the evidence in that case. *See* 823 F.2d at 596.

[7] Similarly, in *People* v. *Cleveland*, 21 P.3d 1225, 1236-37 (Cal. 2001), while agreeing that a judicial investigation of misconduct related to deliberations must be careful, the California Supreme Court declined to:

> adopt the standard promulgated in *Brown*, and refined in *Thomas* and *Symington*, that restricts a court's authority to inquire into whether a juror is unable or unwilling to deliberate and that precludes dismissal of such a juror whenever there is "any reasonable possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case."

That court instead authorized whatever inquiry is necessary to decide that discharge is warranted by requiring the trial court to find as a "'demonstrable reality'" that the juror is being discharged due to his or her views of the merits of the government's case. *Id.* at 1237.

cardinal principle that the deliberations of the jury shall remain private and secret.'" Advisory Committee's Notes on Fed. Rule Crim. P. 23(b) (quoting *United States* v. *Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964)). The principles undergirding these decisions simply cannot be reconciled with the intrusions into the deliberative process approved by the court of appeals in this case.

First, in *Brasfield* v. *United States*, 272 U.S. 448 (1926), this Court held that a trial judge's inquiry into the numerical split among the jurors is grounds for reversal, even though the defendant failed to object to the inquiry at the time it was made. The Court explained that the effect of the judge's inquiry "upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive." *Id.* at 450. As a result, the Court said:

> [i]t can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. . . . and . . . is not to be sanctioned. [*Id.*]

Cf. *id.* ("[an inquiry as to numerical division] serves no useful purpose that cannot be attained by questions *not requiring the jury to reveal the nature or extent of its division*") (emphasis supplied). See also *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988) (citing *Brasfield* as "instructive as to the potential dangers of jury polling"). *A fortiori*, the interrogations of all jurors about the deliberations in this case intruded upon the secrecy of deliberations and exerted a serious and improper influence on the jury.

Second, this Court directly confronted the question whether allegations of juror misconduct during deliberations may be investigated and considered to impeach a jury verdict in

Tanner v. *United States*. The Court held in *Tanner* that such allegations may be investigated and decided where it is alleged that a jury has been infected by "extraneous" or "external" influences (such as contact with an outsider or exposure to media accounts of a crime), but not where the allegations of misconduct involve "internal" matters. 483 U.S. at 117-20 (citing numerous cases).

The Court interpreted Federal Rule of Evidence 606 to bar such post-verdict inquiries into internal matters based in part on the Senate's rejection of a House bill that would have opened "verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, *where a juror alleged that the jury refused to follow the trial judge's instructions* or that some of the jurors did not take part in deliberations." *Id.* at 124 (quoting Sen. Rep. No. 93-1277, at 13 (1974)) (emphasis supplied). And, although Congress was protecting the finality of jury verdicts, it was also guarding the secrecy of deliberations:

> [C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors. [*Id.* at 124-25 (quoting S. Rep. No. 93-1277, at 14)].[8]

Applying this framework, this Court held that evidence of juror intoxication and drug use during deliberations was an

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[8] *See also McDonald* v. *Pless*, 238 U.S. 264, 267-68 (1915) (rejecting use of juror testimony to impeach the verdict because it would "make what was intended to be a private deliberation, the constant subject of public investigation"); *Mattox* v. *United States*, 146 U.S. 140, 148-49 (1892) (allowing jurors to testify about external influences, but not about the effect those influences had on their deliberations).

"internal" matter and could not be used to impeach the jury's verdict. This external/internal distinction thus bars the investigation of juror misconduct during deliberations in order to protect the secrecy of jury deliberations. Cf. also *United States* v. *Olano*, 507 U.S. 725, 742 (1993) (Kennedy, J., concurring) (allowing alternate jurors into deliberation room is unlawful and, if objected to, virtually certain to be reversible error, because the rule "is based on certain premises about group dynamics that make it difficult for us to know how the jury's deliberations may have been affected").

Many of the considerations underlying the rules prohibiting judicial inquiry into the numerical split of a jury during deliberation, post-verdict inquiries into deliberations, and the presence of alternate jurors in the jury room during deliberations, apply with full force to the instant case.[9] "The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system," and judicial probes into those deliberations create two principal dangers. *Thomas*, 116 F.3d at 618.

First, the disclosure of deliberations endangers the operation of the deliberative process itself. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark* v. *United States*, 289 U.S. 1, 13 (1933). See also *Thomas*, 116 F.3d at 618-19 (citing numerous courts and commentators).[10] Jurors

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[9] *See also Cleveland*, 21 P.3d at 1231 ("[m]any of the policy considerations underlying the rule prohibiting post-verdict inquiries into the jurors' mental processes apply even more strongly when such inquiries are conducted during deliberations").

[10] *See also* Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence*, 20 Cardozo L. Rev. 1275, 1313-19 (1999) (explaining that one of Fed. R. Evid. 606(b)'s purposes is ensure open and free debate among jurors).

simply cannot express themselves freely in the jury room if their mental processes are subject to scrutiny.

Second, judicial questioning about deliberations affects those deliberations. As the *Thomas* court explained, "the very act of judicial investigation can at times be expected to foment discord among jurors":

> Were a district judge permitted to conduct intrusive inquiries into – and make extensive findings of fact concerning – the reasoning behind a juror's view of the case, or the particulars of a juror's (likely imperfect) understanding or interpretation of the law as stated by the judge, this would not only seriously breach the principle of the secrecy of jury deliberations, but it would invite trial judges to second-guess and influence the work of the jury. [*Id.* at 620.]

See also *Symington*, 195 F.3d at 1086. A court's inquiries about a juror's expressed or unexpressed views related to the case will most often implicitly convey to the jury the court's disapproval of those views.[11] Jurors who are aware that the juror under investigation favors acquittal may conclude that the judge regards such a position as unreasonable or incorrect, a conclusion that would have a substantial effect on the jury.[12] See also Frank A. Bacelli, Note, *United States v. Thomas:*

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[11] *See also* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 949-50 (1999) ("[t]here is a danger that the judge will be guided by his or her views of what the appropriate outcome of the case should be and may be more likely to dismiss a juror whose views do not accord with those of the judge").

[12] In this case, the district court, after interviewing every juror, informed the jury that Juror Alfonso had been dismissed because of her "'views of the jury process'" and "'her own feelings,'" App. 46a. The interviews in combination with this statement created a significant danger that the remaining jurors were influenced by the judge's disapproval of Juror Alfonso. And, indeed, Juror Grant, who appears to have been a holdout for acquittal with Juror Alfonso (*see id.* at 45a-46a), changed her position shortly after Juror Alfonso's discharge.

When the Preservation of Juror Secrecy During Deliberations Outweighs the Ability to Dismiss a Juror for Nullification, 48 Cath. U. L. Rev. 125, 159 (1998) ("the deeper the investigation's probe, the more likely a juror's opinion of the trial will be revealed to a judge, who may then unintentionally side with certain jurors"). Judicial probing of deliberations operates as the Heisenberg Uncertainty Principle does: In order to make a measurement or determination, the measurer or judge must intrude upon the situation; and, by doing so, he or she disturbs the very system being measured or judged. In physics, failure to recognize this effect may render a measurement inaccurate, while in law, failure to prevent this effect may render the outcome unjust and result in a violation of the accused's constitutional rights.

In sum, this Court's cases demonstrate that "long recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner*, 483 U.S. at 127. The Eleventh Circuit's interpretation of Rule 23(b) – allowing district courts to conduct a full scale probe of jury deliberations based on allegations that a juror is refusing to follow the court's instructions – is in substantial, irreconcilable tension with this authority and should be reviewed by this Court.

III. THE UNIFORM AND CORRECT APPLICATION OF RULE 23(B) IS CRITICAL TO THE FAIR ADMINISTRATION OF JUSTICE AND THE CONSTITUTION.

This Court's intervention is critical, because the uniform, correct application of Rule 23(b) is of central importance to the administration of justice and federal constitutional rights.

The secrecy of jury deliberations is "essential to the proper functioning of juries," and "disclosure of the substance of jury deliberations may undermine public confidence in the jury system." *Thomas*, 116 F.3d at 618 (citing Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886, 889

(1983)). In addition, the fundamental importance of the accused's right to a unanimous verdict by an impartial jury is implicated by the dismissal of jurors based on their views and conduct during deliberations. The Eleventh Circuit has substantially undermined these important constitutional principles, yielding to current fears about jury nullification and the pressure resulting from the heavy caseload of the federal courts.

On the one hand, jurors have the power, but not the right, to nullify the law and vote to acquit, and the courts are in agreement that a juror may be disqualified for his or her refusal to follow the court's instructions as to the law. See *id.* at 615 (citing authority). On the other hand, it is extremely difficult to distinguish "between the juror who favors acquittal because he is purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence,"[13] and equally difficult to conduct the investigation necessary to make such a distinction, because jury deliberations must remain secret. *Id.* at 621.

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[13] *See Cleveland*, 21 P.3d at 1238 ("[t]he circumstances that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge").

This case demonstrates the difficulty of the determination. Several jurors who disagreed with Juror Alfonso on the merits reported comments before the court's reinstruction that supported an inference that Juror Alfonso was refusing to follow the court's instructions. Others (Jurors Butler and Grant) provided contrary testimony. Juror Alfonso said RICO was complicated and that her disagreements with other jurors arose from her application of common sense and life experiences. *See* App. 103a, 111a. Plainly, the record is ambiguous on the basis of Juror Alfonso's views about the case.

To add to the difficulty, a court does not have the option of discharging a juror for "just cause" if there is any doubt about whether he or she is nullifying as opposed to being merely unpersuaded by the evidence. This is because Rule 23(b) must be interpreted and applied without infringement of the defendant's constitutional right to trial by impartial and unanimous jury. See U.S. Const. amend. VI ("[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); *Apodaca* v. *Oregon*, 406 U.S. 404, 369-71, 382, 400, 414 (1972) (Powell, J., concurring) (Douglas, J., dissenting) (Marshall, J., dissenting) (Steward, J., dissenting) (five justices agreeing that a criminal verdict must be unanimous in federal trials). The dismissal of a juror based on doubts about the government's case would violate the accused's right to an impartial and unanimous jury. See *Thomas*, 116 F.3d at 621; *Symington*, 195 F.3d at 1086; *Brown*, 823 F.2d at 596.[14] Even the appearance of such a dismissal would substantially damage public confidence in the jury system.

Simply put, before dismissing a juror based on allegations that he or she is refusing to follow the court's instructions, a court must be certain that the juror is not simply unpersuaded by the government's case. To achieve the necessary level of certainty, the court would have to conduct an investigation that probes the jury's deliberations and violates the established principle that such deliberations should remain secret. Acknowledging the constitutional dilemma, the

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[14] *See Garcia*, 997 P.2d at 8 ("we are equally concerned about a trial court removing a deliberating juror in a manner that appears to facilitate the rendering of a guilty verdict"); *State* v. *Cheek*, 936 P.2d 749, 761 (Kan. 1997) ("[t]he right to a unanimous verdict, or, in the alternative, a jury unable to reach a verdict and the resulting mistrial . . . would be lost if we permitted removal of a juror without reasonable cause so that a unanimous verdict could be reached") (citation omitted); *Valenzuela*, 643 A.2d at 587 (holding that a trial court cannot discharge a juror "merely because that juror is one 'whose position is at odds with the rest of the jury'").

Second, D.C., and Ninth Circuits have held that unless the juror's refusal to obey the court's instructions is essentially undisputed on the record, the district court must not probe the deliberative process, may not weigh conflicting evidence and testimony, and may not discharge the juror at issue. The Eleventh Circuit, in contrast, has authorized a disruptive intrusion into deliberations, has allowed the district court subjectively to weigh conflicting evidence and make credibility determinations, and permitted the discharge of a juror on a patently ambiguous record. This approach, we submit, incorrectly interprets Rule 23(b) and thereby violates the accused's constitutional rights and will erode public confidence in the jury system by undermining jury secrecy and creating an appearance of judicial manipulation. This question deserves the Court's attention.

It may well be that the Eleventh Circuit, by authorizing thorough investigations of the deliberative process, was simply attempting to purify the jury by facilitating the removal of jurors who arguably disregard the court's instructions. But, as this Court said in an analogous context, "[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it." *Tanner*, 483 U.S. at 120. And, while the Eleventh Circuit's lenient approach would assist district courts in moving their dockets by making it easier to discharge a juror who stands in the way of a verdict, the stricter application of Rule 23(b) by other courts of appeals – which precludes discharge of a juror on an ambiguous record – effectively eliminates this incentive to infringe constitutional rights.[15]

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[15] The district court here referred several times to the time the case had consumed. *See* App. 64a ("[w]e have been at this for, excluding matters between trials and before trials, . . . for 8 months almost in trial. I totally disagree with the concept that we are at a point where we ought to do nothing. . . . I am going to do something"); *id.* at 78a (expressing a desire "not . . . to let this case go down easily").

The conflict on the proper application of Rule 23(b) in these circumstances intensifies the importance of this Court's review. It is fundamentally unfair for a criminal defendant in New York or Washington, D.C., to be treated differently in this regard than a defendant in Florida or Georgia. And, equally to the point, it is improper for members of jury venires to be subjected to differing levels of judicial intrusiveness and standards for discharge based on nothing more than geographical location.

Under the Eleventh Circuit's approach, the classic movie *Twelve Angry Men*, which embodies our common understanding of how juries can and should function under our Constitution, would have been very different. In the classic film, the holdout juror is accused by the others of nullification, and extended deliberations follow. In the Eleventh Circuit's hypothetical re-make, the holdout juror is accused of nullification by his fellows; judicial interviews ensue; the juror is dismissed; and a unanimous verdict is reached with an unjust result. Both the nature of the process and the outcome are damaged, or at least changed beyond recognition, by this approach.

This Court should grant the petition to resolve the conflict among the lower courts on this important question of federal law and to establish a uniform interpretation of Federal Rule of Criminal Procedure 23(b) that is consistent with this Court's precedent protecting the secrecy of jury deliberations and the accused's constitutional right to an impartial, unanimous jury.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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May 1, 2002

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 99-12058

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

MICHAEL ABBELL, WILLIAM MORAN,
Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida.

Nov. 7, 2001

Before EDMONDSON, FAY and GARWOOD,* Circuit Judges.

PER CURIAM:

Defendants Michael Abbell ("Abbell") and William Moran ("Moran") (together "Defendants"), appeal their conviction for conspiracy to launder money and appeal the district court's denial of their motions for new trial. The government cross-appeals the district court's judgment of acquittal on the government's charges of RICO conspiracy and the sentencing court's application of the sentencing guidelines.

We affirm the district court's denial of judgment for both Defendants on the money laundering conspiracy, reverse the

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* Honorable Will L. Garwood, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

district court's judgment of acquittal for both Defendants on the RICO conspiracy charges, affirm the denial of Defendants' requests for a new trial, and remand the case to the district court for resentencing in the light of our opinion.[1]

STATEMENT OF THE CASE

In 1996, the government filed a "Fourth Superseding Indictment" charging Defendants, and over 70 other codefendants, with these offenses: 1) participating in a RICO conspiracy (Count I); 2) engaging in substantive RICO violations (Count II); 3) participating in a conspiracy to import cocaine (Count III); 4) participating in a conspiracy to import and distribute cocaine (Count IV); and 5) participating in a conspiracy to launder money (Count IX). The government first prosecuted Defendants at trial beginning in 1997. Defendants were acquitted of the substantive RICO count (Count II) after a five-month trial, but the jury could not reach a verdict on the other counts. The district court declared a mistrial on those counts.

The government tried Defendants a second time beginning in 1998. The district judge did not grant Defendants' motions for judgment of acquittal: motions made on all counts at the close of the government's case and after all of the evidence. During jury deliberations, the court received word that one of the jurors was behaving improperly and refusing to obey the law or to obey the court's jury instructions. The court then

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[1] Defendants' motion to dismiss the government's appeal for lack of jurisdiction is denied. The government's notice of appeal was timely. *See* 18 U.S.C. § 3731; Fed. R.App. P. 4(b)(1)(B)(i), (b)(2); *United States v. Rothseiden*, 680 F.2d 96, 97 (11th Cir.1982); *United States v. McInnis*, 601 F.2d 1319, 1322-23 (5th Cir.1979). Furthermore, the requirement that the government obtain approval under 18 U.S.C. § 3742(b) to prosecute this appeal is not jurisdictional. *United States v. Hall*, 943 F.2d 39, 41 (11th Cir.1991). The government stated in its response to the motion to dismiss that approval was obtained. *See id.*

gave the jury instructions about the illegality of nullification and about the jury's duty to apply the law as instructed by the court. After receiving more complaints from jury members, the court conducted an inquiry into the conduct of one of the jurors. The court talked with the juror in question and with each member of the jury in an attempt to ascertain whether the juror's conduct warranted her dismissal.

Over Defendants' objections, the district court dismissed the juror. The court had concluded that the juror was not applying the law to the case. Then, the jury found Defendants guilty of the RICO conspiracy (Count I) and money laundering conspiracy (Count IX) counts. The jury could not reach a verdict on the counts charging conspiracies to import and distribute cocaine (Counts III and IV).

Defendants filed motions for a new trial based on the juror's dismissal and on their discovery that another juror planned to write a book about the trial. The court denied the motions for a new trial. The court granted a post-trial judgment of acquittal on the RICO conspiracy charges (Count I) and on the conspiracy to import and distribute cocaine charges (Counts III and IV), but allowed the jury's guilty verdict on the money laundering conspiracy to stand.

Abbell and Moran were sentenced to 87 months and 60 months in prison, respectively. Abbell is free pending this appeal. Moran, who fled the jurisdiction before the verdict, was captured and is incarcerated.

Defendants appeal the district court's denial of judgment of acquittal on the money laundering conspiracy charge (Count IX) and the district court's denial of their motion for new trial based on the jury problems. The government cross-appeals the district court's entry of judgment of acquittal on the RICO conspiracy charge (Count I) and the district court's calculation of Defendants' specific offense levels pursuant to the United States Sentencing Guidelines § 2S1.1.

I. BACKGROUND [2]

In the 1980s and 1990s Miguel Rodriguez-Orejuela was one of the leaders of a widespread cocaine producing and smuggling empire that imported large quantities of cocaine into the United States. The organization widely know as the Cali Cartel (the "Cartel") smuggled cocaine into the United States by creatively concealing the cocaine and by using front businesses that were engaged in drug smuggling.

The Code of Silence and Efforts to Avoid Extradition

Rodriguez-Orejuela and other leaders of the Cartel maintained a strict code of silence among their employees. Employees were told not to cooperate with authorities if employees were ever arrested. To maintain this code of silence the Cartel utilized a carrot-and-stick approach. On the one hand, the Cartel paid the attorney's fees of members and expenses for those members' families and, on the other hand, threatened those employees who were arrested and their families with injury or death if they cooperated with authorities.

Rodriguez-Orejuela also conducted an active campaign of collecting sworn statements from his employees to shield himself from prosecution or extradition to the United States. Members or employees of the Cartel apprehended by police would often soon thereafter sign affidavits disavowing knowledge of, or involvement with, Rodriguez-Orejuela, who was often named as a codefendant in prosecutions of persons apprehended by United States' authorities.

Later this program expanded to include taking deposition testimony from certain people who had been arrested in the United States. During deposition, they would give statements

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[2] Because this appeal concerns charges where the jury found for the government, we take the facts in the light most favorable to the government's theory of the case. *See United States v. Taylor*, 972 F.2d 1247, 1250 (11th Cir.1992).

similar in nature to the statements in the affidavits. Persons were picked to give such deposition testimony based on the degree to which Rodriguez-Orejuela was implicated in their case by other evidence and by the degree to which he thought that the person would provide answers favorable to Rodriguez-Orejuela.

The Plan in Action

The evidence presented in this case centers around Defendants' acts relating to the arrest (due to four successful investigations by United States authorities) and trials of drug traffickers. In November 1991, a group of people led by Gustavo Naranjo ("Naranjo") was arrested after a shipment of cocaine was imported into Miami inside concrete pillars and then transported to Texas. In April 1992, a group of people led by Harold Ackerman ("Ackerman") was arrested in connection with cocaine disguised in frozen vegetables. In April 1993, a group of people led by Carlos Torres ("Torres") was arrested for conspiracy to import 500 kilograms of cocaine. In September 1993, a group of people led by Raul Marti ("Marti") was arrested in connection with a drug smuggling operation run out of a coffee-importing business.

The Naranjo Case

In August 1991, cocaine was discovered hidden inside concrete posts that were being delivered to the port of Miami. Customs agents set up surveillance of the shipment. In November 1991, a portion of the shipment was removed from a warehouse and transported to Texas where the cocaine was removed from the concrete posts. In Texas, Naranjo, Tommy Johnson, William Brooks, Anibal Restrepo and J.C. Lanier were arrested.

Customs Agent Edward Kacerosky, who was deeply involved in the pertinent case, met with Naranjo shortly after his arrest. Naranjo began to cooperate with authorities and made some recorded phone calls to Rodriguez-Orejuela and

another Cartel employee in Miami. The arrests in this case were made public on 25 November 1991. Searches were then conducted yielding a seizure of 12,250 kilograms of cocaine.

After the arrests were made public, Joel Rosenthal, a Miami lawyer, flew to Texas and met with Naranjo. Naranjo stopped cooperating after the visit from Rosenthal. Rosenthal arranged for Texas lawyer Frank Jackson to represent Naranjo. Rosenthal paid Jackson with money from Rodriguez-Orejuela. Naranjo was convicted in March 1992.

The Ackerman Case

Agent Kacerosky continued his investigations based on information he obtained from the Naranjo case. This activity led to the arrest of Harold Ackerman, Carlos Giron, Pedro Pablo Gomes and Jacome Milanes for importing cocaine hidden in frozen vegetables. Searches resulted in a seizure of 6,650 kilograms of cocaine and of detailed ledgers showing millions of dollars in proceeds from cocaine sales and showing millions of dollars having been shipped back to Rodriguez-Orejuela in Columbia.

Rodriguez-Orejuela told Ackerman all about the code of silence back when Ackerman had been brought into the business. Rodriguez-Orejuela also had told Ackerman that, if Ackerman was ever arrested, his lawyer would be paid for and his family would be taken care of. Whenever Ackerman brought a new person into the smuggling activities, Rodriguez-Orejuela would tell them about the code of silence. Before Ackerman took over certain smuggling activities, he was introduced to Defendant Moran who was told that Ackerman would now be in charge.

Ackerman hired lawyer Robert Moore and instructed Moore to hire other lawyers for his codefendants. Francisco Laguna ("Laguna") (who worked for Defendant Abbell) [3]

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[3] Central to the government's case, Laguna's testimony throughout the trial was that Abbell and he were in constant communication about the

visited Ackerman in prison a few days after Ackerman's arrest, and Ackerman asked Laguna to relay a message to Rodriguez-Orejuela that Ackerman wanted his attorney's fees paid. Ackerman was threatened by Gonzalo Paz, one of Rodriguez-Orejuela's Colombian attorneys, that he should not cooperate with police. After a trip to Colombia, Moore also relayed a message from Rodriguez-Orejuela to Ackerman that he should not cooperate with authorities or Ackerman's family would be killed.

Ackerman retained an independent lawyer, Ed Shohat, in October 1992. While representing Ackerman, Shohat received a call from Defendant Abbell. Abbell told Shohat that Rodriguez-Orejuela had agreed to pay his legal fees and wanted Ackerman to sign an affidavit that both Shohat and Abbell knew to be false. Shohat refused to have Ackerman sign the affidavit.

Defendant Moran represented Carlos Giron who was arrested and went to trial with Ackerman. When Shohat pursued a coercion defense for Ackerman, Moran asked if Shohat had received permission from Rodriguez-Orejuela to do so. All of the defendants in the Ackerman case were convicted.

The Torres Case

Working for Rodriguez, Carlos Torres was arrested in April 1993 for charges involving a 500-kilogram cocaine conspiracy. He pleaded guilty nine months later.

Torres hired Miami lawyer Stephen Golembe, who had earlier successfully represented Torres' wife. Torres' wife called Rodriguez-Orejuela to obtain money for her husband's legal fees. Rodriguez-Orejuela told her to talk to Moran, which she then did. Moran told Mrs. Torres that her husband

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work Laguna was doing for Rodriguez-Orejuela and that Laguna's activities were directed and approved by Abbell.

had to pick Moran as his lawyer because Rodriguez-Orejuela had said so. Moran met with Torres after Torres' initial appearance before the district court. Moran told Torres that Moran was going to Colombia. Torres told Moran to tell Rodriguez-Orejuela and Jorge Lopez to change all the beeper numbers because the police had them. Moran wrote this information in his notes.

Moran requested and received money from Rodriguez-Orejuela for attorney's fees for Torres and his codefendants. Moran was able to obtain a $250,000 corporate surety bond for Torres and faxed a letter to Rodriguez-Orejuela requesting that property used to collateralize the bond come from "clean money." It was never necessary to put up the money for the bond: the government successfully appealed the bond ruling and kept Torres in jail.

Torres fired Moran after hearing that Moran had written the prosecutor to inquire about a plea bargain. Torres went back to Golembe, but he fired Golembe when Golembe filed a statement with a probation officer that implicated Rodriguez-Orejuela. Torres then hired Laguna and Ferguson. Laguna submitted a new statement on behalf of Torres that did not implicate Rodriguez-Orejuela.

The Marti Case

Agent Kacerosky was able to identify another smuggling operation from the records obtained in the Ackerman case. In September 1993, authorities searched coffee containers that had arrived in Miami in August and had been under surveillance since their arrival. Authorities seized over 5,600 kilograms of cocaine. Raul Marti, Oscar Rabasa, Rodney Paterson and Richard Carlyle were arrested for involvement with the importation of the cocaine.

Marti hired Miami lawyer Dan Forman to represent him. Laguna informed Forman that Laguna represented Rodriguez-Orejuela and wanted Marti to sign one of the exculpatory

affidavits. When Forman informed Laguna that he would not tell his client to sign a false affidavit, Laguna told Forman that Rodriguez-Orejuela would not pay Marti's legal fees unless Marti signed the affidavit.

Later, Laguna visited Marti in jail without Forman's permission. Laguna then called Forman to inform him that funds were being transferred to him. Forman notified the government of the $100,000 he received and turned it over to the government.

Cash Payments to Prisoners and Family Members

During his representation of Giron, Moran's secretary gave Giron's wife $5,000 in cash that Giron's wife believed to have come from Rodriguez-Orejuela. In May 1993, Moran had a courier deliver $10,000 to Torres' wife. After receiving the money, Mrs. Torres was arrested and deported to Colombia. After Giron was convicted and he retained Ristau & Abbell, the firm began paying about $100 a month into his prison commissary account. Ristau & Abbell also made payments into Torres' commissary account. The advances to Giron and Torres were made for about a year. Ristau & Abbell also made payments into the commissary accounts of people who were not clients of the firm. All of the payments were made using money orders as required by the Bureau of Prisons' regulations.

Laguna delivered cash payments to Giron's wife, to Torres' wife and to Torres' son. Laguna also arranged for a corporate surety bond in the amount of $500,000 for Raul Marti, which required a $75,000 payment to a bail bondsman. Laguna and Abbell asked Ferguson to receive the cash payment and to forward the money to Marti's wife. Ferguson received the money and forwarded it to Marti's wife.

II.

The Money Laundering Conviction

The structure of the money laundering statute, 18 U.S.C. § 1956, makes it illegal to engage knowingly in acts involving illegally obtained money either to promote a criminal activity or to conceal the source of the funds. The jury, by special verdict in this case, found that Defendants had engaged in acts to conceal the source of the funds, not to promote illegal activity.[4]

Defendants argue on appeal that the government failed to prove that Defendants ever joined or intended to join an illegal agreement to violate the money-laundering concealment statute. Also Defendants argue—more specifically—that the government could not show that they agreed to enter such an agreement because the government never showed that the transactions that actually took place were illegal. Defendants say the government failed to produce sufficient evidence that 1) the funds involved in the transactions were from narcotics proceeds; 2) that Defendants knew the funds were from narcotics proceeds; and 3) that the purpose of the transactions was to disguise the source or ownership of the funds involved or to create the appearance of legitimate wealth for Rodriguez-Orejuela.

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[4] The jury therefore convicted Defendants under the concealment part of the money laundering statute, 18 U.S.C. § 1956(a)(1)(B)(i), which says:

"Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" violates the statute.

Defendants first argue that the government failed to present evidence that the actual funds used in the pertinent transactions came from illegal activity. Pointing to precedents, they say that, when the government fails to trace directly the funds used in the transactions, it must at least show that no source of legitimate income could have generated the funds used or that the funds used come from a source of funds that are commingled with illegally obtained funds. But, Defendants overstate the holdings in the cases upon which they rely.

In *United States v. Eastman*, 149 F.3d 802, 804 (8th Cir.1998), the Eighth Circuit said that it was sufficient evidence to support a jury verdict for the funds to come from illegal sources if the government showed defendant had no legitimate source of income to create these funds. In *United States v. Westbrook*, 119 F.3d 1176, 1191 (5th Cir.1997), the Fifth Circuit said it was sufficient evidence to support a jury determination if the government showed that "defendant's cash outflow in a financial transaction exceed[ed] his legitimate income." These cases decided issues about whether the proof in those cases was sufficient to support a jury verdict, not about the degree of proof that is required as a minimum.

In this case, the government presented evidence that the Cartel received proceeds from drug sales in the hundreds of millions of dollars. Evidence was presented that much of this money was kept in Miami and used to finance Cartel operations and that large sums of it were transported to Colombia for Rodriguez-Orejuela's use. When a jury hears evidence that a drug operation is bringing in hundreds of millions of dollars, keeping large sums in Miami, and sending large sums to Rodriguez-Orejuela in Colombia, the jury can reasonably infer that the money Rodriguez-Orejuela used to pay lawyers defending himself and his employees from prosecution for drug trafficking is coming from specified illegal activity.

Defendants argue that evidence showed that Rodriguez-Orejuela, in Colombia, owned a wide variety of "legitimate"

businesses, including a chain of pharmacies, grocery stores, construction companies, and a soccer team from which Rodriguez-Orejuela could have paid Defendants. We will accept that Rodriguez-Orejuela's businesses produced some amount of cash flow from which the funds used in transactions underlying this case might have been derived. We, however, will not accept that the evidence demanded a finding that Rodriguez-Orejuela's businesses were "legitimate."

Defendants forget that our job is to review the sufficiency of the evidence: not to choose between competing interpretations. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. A jury is free to choose among the constructions of the evidence." *United States v. McDowell*, 250 F.3d 1354, 1365 (11th Cir.2001) (quoting United States v. Calderon, 127 F.3d 1314, 1324 (11th Cir.1997)).

Defendants point us to no evidence on the amount of money that these companies made, and they offered no formal documents proving the existence of these companies or the amount of income Rodriguez-Orejuela himself derived from these companies. But, more important, the government presented evidence that all of Rodriguez-Orejuela's "legitimate" businesseswere funded with narco-profits. In addition to supporting a finding that the ultimate source of the money received by Defendants was illegal activity, we think the government's evidence on this point supports a finding that Rodriguez-Orejuela's illegal and legal moneys—to the extent legal moneys existed—were commingled, thus tainting all funds originating from Rodriguez-Orejuela.[5] *See United*

[5] The amount of illegal money that needs to be combined with another, larger amount of legal money need only be slight to render all the money commingled and, therefore, illegal. And, once the illegal and legal

States v. Cancelliere, 69 F.3d 1116, 1120 (11th Cir.1995) (money laundering statute allows for conviction "where the funds involved in the transaction are derived from commingled account of which only part comes from 'specified unlawful activities'").

The government must prove the funds came from illegal activity. We conclude that, when the government presents the kind of evidence it presented in this case, the evidence is sufficient to support a beyond-reasonable-doubt jury finding that the pertinent funds came from an unlawful source. We acknowledge that Defendants' evidence about "legitimate" businesses might be able to rebut the government's evidence in the eyes of some jury. But Defendants' evidence does not nullify the government's evidence to demand that we overturn a factual finding by the jury that the funds came from illegal activity.

Defendants next contend that no evidence was presented from which a reasonable jury could determine that Defendants actually knew the funds provided in the pertinent transactions were proceeds from narcotics dealing. Evidence presented by the government supported finding that both Defendants 1) knew that their long-time clients were high level drug traffickers; and, 2) were close to and knew Rodriguez-Orejuela and his associates well.

Evidence presented by the government against Abbell further supported findings that 1) Abbell altered, deleted, or destroyed his financial records involving Rodriguez-Orejuela; 2) Abbell worked closely with his long-time associate,

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moneys are commingled, no passage of time will remove the taint. *United States v. Ward*, 197 F.3d 1076, 1083 (11th Cir.1999) ("The district court's theory that the passage of time and the large infusion of legal proceeds remove the taint from the illegal proceeds defeats the purpose of the money laundering statute and promotes money laundering schemes. Because money is fungible, the government must prove only that the tainted proceeds were commingled with other funds.").

Laguna, who testified that he (Laguna) was in "constant contact" with Abbell about their representation of Rodriguez-Orejuela and other Cartel clients; and 3) Laguna knew that all Rodriguez-Orejuela's businesses were funded with narco-profits.

Abbell contends that the government essentially argues that Abbell knew that the funds he received were derived from narcotics trafficking because Abbell knew his client was involved in narcotics trafficking. Abbell argues that evidence that he knew of Rodriguez-Orejuela's extensive narcotics trafficking is not sufficient to prove that Abbell had knowledge of the illegality of the funds he received, considering that the evidence of Rodriguez-Orejuela's "legitimate" business interests establishes a legitimate source of funds from which Abbell reasonably believed he was being paid.

As discussed above, the evidence of Rodriguez-Orejuela's allegedly legitimate business interests in Colombia is slight: no formal documents evidencing their existence and no evidence of the amount of money they allegedly produced. The government's evidence, in contrast, tends to show that all of the businesses were established with narcotics proceeds *and* allows—when combined with other evidence—a reasonable jury to infer that Abbell *knew* (based on the reasonable inference of what Laguna told Abbell) [6] that all Rodriguez-Orejuela's businesses were established with narcotics proceeds. Thus, if the evidence shows that Rodriguez-Orejuela had other business interests, the evidence also shows that

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[6] Laguna testified that he was in "constant contact" with Abbell about their representation of Rodriguez-Orejuela and other members of the Cartel for drug trafficking—including forfeiture proceedings that required investigation into the finances of Cartel businesses in Colombia. Abbell's office manager also testified that Laguna and Abbell talked two or three times a day. The jury could reasonably infer that Laguna told Abbell about the state of Rodriguez-Orejuela's businesses in Colombia: that they were all financed with narco-profits.

Abbell knew those interests were not legitimate. In other words, the evidence supported a jury finding beyond a reasonable doubt that, to the extent Rodriguez-Orejuela had other business interests, Abbell knew that those business interests were so intertwined with Rodriguez-Orejuela's narcotics trafficking that money paid by Rodriguez-Orejuela came, at a minimum, from commingled funds.

The government's evidence that, in the days and weeks before a search warrant was executed against Abbell's office, Abbell destroyed or altered his records of his bills to Rodriguez-Orejuela—including his bills for reimbursements for payments to third-parties on Rodriguez-Orejuela's behalf—further supports a reasonable jury's finding that Abbell knew the money he was paid involved the drug trade. *See United States v. Mastropieri*, 685 F.2d 776, 790-91 (2d Cir.1982) ("There can be no doubt that an attempt to suppress material records permits an inference of consciousness of guilt and therefore of guilt itself."); *cf. United States v. Hughes*, 716 F.2d 234, 240-41 (4th Cir.1983) ("Fabrication of evidence by a defendant . . . [is] clearly admissible to prove his guilty state of mind.").

The government also presented sufficient evidence upon which a jury could reasonably find that Moran knew that the money he received was derived from narcotics trafficking. The government presented evidence that Moran often solicited money from Rodriguez-Orejuela. When he made these solicitations, he normally did not indicate that he needed "clean money," or that he desired unclean money. For instance, in Moran's notes that he made after a meeting with Torres in jail, Moran recorded that he needed to request money from Rodriguez-Orejuela to pay to Torres for support of his family.[7] Those notes do not mention any requirement

[7] Immediately after this meeting with Torres, Moran flew to Colombia and met with Rodriguez-Orejuela. Moran then flew back with money for Torres and couriered $10,000 to Torres' wife.

that the money be "clean." A fax from Moran to Rodriguez-Orejuela's men in Colombia during the same period also requests money for Torres without specifying that it be "clean money." In contrast, another fax from Moran to Rodriguez-Orejuela's men in Columbia, also sent around the same time, specifically requested "CLEAN MONEY" (all caps in original) for use in obtaining Torres' bond. Such a request could either imply that Moran only dealt in clean money or, especially in the light of his failure to request "clean money" in other situations, that he felt he needed clean money only for this specific transaction.[8] Such a determination is for the jury. We think that this "CLEAN MONEY" evidence supports a beyond-reasonable-doubt jury finding that Moran was aware that some money he was receiving was from narcotics trafficking. Put differently, we accept that a jury could treat the emphatic and isolated request for "clean money" as evidence that "clean money" was the exception to the usual rule of dirty money. We recall the ancient legal maxim: the exception also declares the rule.[9]

We now address whether the evidence supports a finding that the transactions in which Defendants were involved were designed to conceal the source of the funds. Abbell concedes that he engaged in the following transactions. He, on

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[8] In fact, evidence was presented to the jury that Moran did need clean money for this specific transaction. Torres' bond included an explicit requirement that the money not be proceeds of illegal activity. Thus, a jury could reasonably conclude that, when outside influences demanded the use of clean money, Moran requested clean money because he knew that if he did not request clean money, the money he received would be from narcotics trafficking.

[9] Exceptio quoque regulam declarat: "[t]he exception also declares the rule." S.S. Peloubet, *A Collection of Legal Maxims in Law and Equity* 74 (Fred B. Rothman & Co. 1985) (1884) (collecting legal maxims, citing to their origin, and providing English translations). A related maxim states: Exceptio probat regulam de rebus exceptio, "[a]n exception proves the rule concerning things not excepted." *Id.*

multiple occasions, paid money into the commissary accounts of inmates: both those inmates he represented and those he did not. He deposited this money in their accounts using money orders paid for by Ristau & Abbell and signed by Abbell or Ristau. Abbell then billed Rodriguez-Orejuela for these sums. Abbell also paid Mrs. Giron (wife of one of the defendants) $3,000. He then billed Rodriguez-Orejuela for the $3,000. Abbell's office manager testified that Rodriguez-Orejuela thereafter reimbursed Abbell for the deposits and the $3,000.

Moran concedes that he engaged in the following transactions. He paid Mrs. Giron $5,000 in cash. He paid her this money in his office. He sent Mrs. Torres (wife of another defendant) $10,000 in cash. This money was sent via commercial courier, identifying his law firm as the sender. Evidence was presented that the cash for both of these payments was given to Moran by Rodriguez-Orejuela in Cali.

Defendants argue that no evidence shows that these payments were designed to conceal the source of the funds; they say they were paid to help people in need of financial assistance. Defendants argue that evidence did not demonstrate the "legitimization" step required for money laundering. We disagree.

Defendants correctly point out that we have said section 1956(a)(1)(B)(i) is "designed to punish defendants who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises." *United States v. Majors*, 196 F.3d 1206, 1212 (11th Cir.1999). The facts here do not appear to be that kind of case. No evidence shows that the pertinent transactions ended up creating the appearance of legitimate wealth for Rodriguez-Orejuela.

But, the text of the statute is not that restrictive. It applies to transactions involving illegal proceeds when the transaction is designed "to conceal or disguise the nature, the

location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). The statute does not always require that the appearance of legitimate wealth be generated for Rodriguez-Orejuela. We believe it is enough for the statute that Defendants engaged in transactions from which Rodriguez-Orejuela received a benefit (and moneys were paid on behalf of Rodriguez-Orejuela) while concealing that Rodriguez-Orejuela was the source of the funds.[10]

In this case, the evidence showed 1) Rodriguez-Orejuela was obligated to take care of people to maintain the code of silence; 2) Rodriguez-Orejuela was seeking to avoid extradition to, and prosecution in, the United States by obtaining from employees affidavits stating that they did not even know who he was; 3) Defendants were involved in obtaining the affidavits while they were involved at the same time in dispersing funds from Rodriguez-Orejuela to employees, and their wives, who were claiming not to know Rodriguez-Orejuela; 4) Rodriguez-Orejuela gave Defendants large sums of money; and 5) Defendants then paid large amounts of this money to others, including employees from whom affidavits were sought and their wives.[11] This evidence supports a jury

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[10] Concealing the source of funds does not need to be the only goal of the pertinent transaction. *See United States v. Wynn*, 61 F.3d 921, 924 (D.C.Cir.1995). Also, that Defendants openly made payments to the Bureau of Prisons, Mrs. Torres, and Mrs. Giron fails to demonstrate that they were not attempting to disguise the source of the funds. *See United States v. Starke*, 62 F.3d 1374, 1384 (11th Cir.1995).

[11] In Abbell's case, points four and five are reversed for the transactions discussed. In the context of this case, the fact that Abbell first advanced his own money in the transactions at issue and then sought reimbursement from Rodriguez-Orejuela is of no legal consequence. Abbell, however, argues that "before the primary offense of money laundering can occur, the underlying criminal activity must be complete." *Majors*, 196 F.3d at 1212 n. 13. The flaw in Abbell's reliance on quotes like the one above is that evidence showed that Rodriguez-Orejuela had, before Abbell made the payments at issue, already engaged in massive

finding that these transactions were designed to conceal that Rodriguez-Orejuela was paying money to persons, and their families, who were claiming that they did not know who he was.

The evidence thus adequately supports the finding that Defendants willfully participated in a conspiracy to conceal the source of funds that were the proceeds of unlawful conduct and were paid to cartel employees and their families by Rodriguez-Orejuela.

RICO Conspiracy

We review the district court's entry of judgment of acquittal for insufficient evidence on the RICO conspiracy charge *de novo*. *United States v. Toler*, 144 F.3d 1423, 1428 (11th Cir.1998). We must take the evidence in the light most favorable to the government and determine whether a reasonable jury could have concluded beyond a reasonable doubt that Defendants were guilty of the offense charged. *Id.*

The indictment charged Defendants with participating in a RICO conspiracy and listed various forms of obstruction of justice and money laundering as predicate acts agreed to by Defendants. Agreement to participate in a RICO conspiracy can be proved in one of two ways: 1) by showing an agreement on an overall objective; or, 2) by showing that a defendant agreed personally to commit two predicate acts and therefore to participate in a single objective conspiracy. *United States v. Church*, 955 F.2d 688, 694 (11th Cir.1992). If the government can prove an agreement on an overall

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illegal narcotics trafficking. We discern no other relevant difference between the order in which Abbell and Moran completed points four and five.

objective, it need not prove a defendant personally agreed to commit two predicate acts. *United States v. To*, 144 F.3d 737, 744 (11th Cir.1998).[12]

For Defendant Moran, we have little trouble determining that a reasonable jury could have concluded beyond a reasonable doubt that he agreed to commit two predicate acts showing an agreement to participate in the RICO conspiracy.

We have already addressed Moran's activities in the money laundering conspiracy which supports a finding that he was engaged in those predicate acts. Moreover, evidence supports the conclusion that Moran was very much involved in obtaining multiple false affidavits from members of the Cartel who were arrested importing drugs—each false affidavit constituting a separate predicate act.

Copies of affidavits were found on Moran's computers in his office. Also, letters to other attorneys were presented into evidence where Moran outlined the procedure for procuring affidavits from their clients that would exculpate Rodriguez-Orejuela. In one letter Moran wrote to Rodriguez Orejuela; "Setting aside our most recent disagreements as to the best way of acquiring certain affidavits, my observations is that

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[12] Paragraph 2 of the indictment lists over 70 people as well as "others known and unknown to the grand jury." It then says that they "managed, operated, were employed by and associated with the Enterprise." Defendants argue that this language requires the government prove Defendants operated or managed the conspiracy, even though the law of this circuit does not require such proof for a RICO conspiracy. We disagree.

In the light of the whole indictment, it is clear to us that paragraph 2 is a general statement that this group of over 70 people, *as a group*, managed, operated, was employed by and associated with the Enterprise—not that each person individually did all of these things. The indictment goes on to charge specific acts within the conspiracy to the many individuals allegedly involved. Because neither the indictment nor the law of the circuit require proof that Defendants operated or managed the enterprise, Defendants' collateral estoppel argument also fails.

what was most important to accomplish has been attained, and at the same time I think that some of my suggestions, at least in part, that of using an independent attorney (Laguna), has been suitable to this matter, and everyone came out clean." This letter is at least evidence of Moran's organizational capacity in the false affidavit scheme and his awareness that special procedures needed to be used for everyone to come out "clean." A jury could infer from this letter both an organizational role by Moran and guilty knowledge on his part.

About Defendant Abbell, in addition to his acts in the money laundering conspiracy, we conclude the government offered sufficient evidence of two predicate acts of obstruction of justice, supporting the jury's verdict for RICO conspiracy. We focus specifically on two predicate acts. First, Abbell's involvement in trying to obtain a false exculpatory affidavit from Ackerman; and, second, his involvement in the section 1782 deposition process.

Evidence was presented that Abbell was deeply involved in obtaining a false affidavit from Ackerman. While attempting to get the affidavit from Ackerman, Abbell spoke with Ackerman's lawyer Ed Shohat. Shohat recognized the affidavit as false and that Abbell knew the affidavit was false. Shohat also testified that Abbell had told Rodriguez-Orejuela that Shohat would make sure Ackerman signed the affidavit, thus putting Shohat in danger if Ackerman did not sign. Abbell also visited Ackerman in prison, where Ackerman indicated he intended to sign the affidavit and asked Abbell to ask Rodriguez-Orejuela to pay his attorney's fees.

Evidence was also presented that Abbell directed the 1782 deposition scheme. Abbell targeted employees of the Cartel likely to give false exculpatory statements benefitting Rodriguez-Orejuela, but warned against deposing employees of the Cartel who might give damaging statements. Abbell

knew that the employees he targeted, such as Giron whom he represented, would have to lie to answer the questions in a manner that benefitted Rodriguez-Orejuela.

Abbell argues that his activities in obtaining false affidavits and directing efforts to obtain section 1782 depositions could not, as a matter of law, possibly constitute predicate acts of obstruction of justice. Relying on *United States v. Aguilar*, 515 U.S. 593, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995), and *United States v. Vaghela*, 169 F.3d 729 (11th Cir.1999), Abbell—correctly, we think—contends that a person does not engage in obstruction of justice unless his acts will have the natural and probable effect of interfering with a judicial proceeding. He then says that, because the affidavits and the section 1782 depositions were meant only to be used in extradition proceedings in Colombia, and that the possibility of such extradition proceedings ever occurring were extremely low, the possibility of use in a judicial proceeding was, at best, speculative.

After reviewing the statute and the precedents upon which Abbell relies, we conclude that his arguments are without merit. In *Aguilar*, the essential question was the intent of the defendant. *Aguilar*, 115 S.Ct. at 2362. The Court wrote that, when a person makes a statement to an investigating official (and the speaker is not aware that it is likely that the official will testify in a judicial proceeding) not enough evidence is presented of that lying person's intent to interfere with a judicial proceeding. *Id.* at 599, 115 S.Ct. 2357. But in *Vaghela*, we said the requirement that defendants' acts have the natural and probable effect of interfering with the due administration of justice is not so narrow as to exclude efforts "to obstruct specific future judicial proceedings." *Vaghela*, 169 F.3d at 734.

In this case, Rodriguez-Orejuela had already been named in several cases as a codefendant. Therefore, judicial proceedings in the United States were in progress to which the

false affidavits and depositions could be linked. Defendants' claim that the affidavits or depositions were to be used in extradition proceedings in Colombia is not determinative. It is clear that these affidavits (which were in English) could also be used as a defense if Rodriguez-Orejuela was ever forced to stand trial in one of the cases in which he was a named defendant.[13] Moreover, a lawyer working the affidavit scheme would know that these affidavits and depositions could be so used.

Because we conclude that sufficient evidence was produced by which a jury could find beyond a reasonable doubt that Defendants agreed to overall goals of the RICO conspiracy or engaged in two predicate acts manifesting their agreement, or both, the district court's order granting Defendants judgment of acquittal on Count I must be vacated.

Defendants' Motion for New Trial

Defendants argue that they are entitled to a new trial for two reasons. First, they say that new evidence on Juror Blanton's plans to write a book about the case demanded more inquiry by the district court into what influence this plan had on jury deliberations. Second, they say they were denied their right to a unanimous jury verdict when the court improperly excused Juror Alfonso for cause under Fed.R.Crim.P. 23(b). We conclude Defendants are not entitled to a new trial: the district court did not abuse its discretion.

Juror Blanton

We first briefly address, and determine that there is no merit in, Defendants' arguments regarding Juror Blanton. The district court correctly noted that no factual basis exists

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[13] Defendants come close to admitting as much when they say that the affidavits would not have been very helpful to an extradition proceeding in Colombia, because they say factual innocence is no defense to extradition in Colombia.

for the assertion that Blanton shared outside information with the jury during trial. And Blanton's plan to write a book about his experiences on the jury does not constitute the kind of allegation about outside influence that we have said requires an investigation by a district court. *See United States v. Caldwell*, 776 F.2d 989, 996 (11th Cir.1985) ("The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate.").

Dismissal of Juror Alfonso

We review a district court's ultimate decision to excuse a juror after the start of deliberations for abuse of discretion. *United States v. Register*, 182 F.3d 820, 839 (11th Cir.1999). And, in the context of other juror removal cases, we have written that "[w]e will reverse the district court only if we find that it discharged the juror 'without factual support, or for a legally irrelevant reason.'" *Id.* at 839 (quoting *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir.1990)).

Federal Rule of Criminal Procedure 23(b) permits a district court "to excuse a juror for just cause after the jury has retired to consider its verdict." "Just cause" exists to dismiss a juror when that juror refuses to apply the law or to follow the court's instructions. *United States v. Geffrard*, 87 F.3d 448, 451-52 (11th Cir.1996) (excusing juror who expressed inability to follow judge's instructions on the law due to religious beliefs).

Juror Alfonso was dismissed after other members of the jury alleged, in a note to the district court judge, that Juror Alfonso was not applying the law as directed. A risk exists, however, that ten or eleven members of a jury that have collectively reached agreement on a case's outcome may thereafter collectively agree that the one or two hold-outs—instead of honestly disagreeing about the merits—are actually refusing to apply the law as instructed by the court in an impermissible attempt to nullify the verdict. The jury's

majority may very well further agree to request the court's intervention with regard to those one or two dissenting jurors who are, according to the majority, refusing to apply the law. Thus, judges must be careful not to dismiss jurors too lightly, even in the face of complaints from a majority of the jury. Federal defendants have some right (be it statutory or perhaps constitutional) to a unanimous verdict by, normally, twelve jurors.

Because of the danger that a dissenting juror might be excused under the mistaken view that the juror is engaging in impermissible nullification, we must apply a tough legal standard. In these kind of circumstances, a juror should be excused only when no "substantial possibility" exists that she is basing her decision on the sufficiency of the evidence. *See United States v. Thomas*, 116 F.3d 606, 621-22 (2d Cir.1997); *United States v. Brown*, 823 F.2d 591, 596 (D.C.Cir.1987).[14] We mean for this standard to be basically a "beyond reasonable doubt" standard.

We also conclude that, for example, whether a juror is purposely not following the law is a finding of fact that we will review for clear error.[15] *De novo* review would undermine the well-established rule that the abuse of discretion

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[14] In *United States v. Brown*, the D.C. Circuit used both the term "any possibility" and the term "substantial possibility." We believe the terms are interchangeable, both meaning a tangible possibility, not just a speculative hope. *Cf. Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 2549-50, 101 L.Ed.2d 490 (1988) (noting two different meanings of "substantial;" one meaning a high degree or great deal of something, the other meaning in substance or in the main).

[15] The Ninth Circuit explicitly applied a clearly erroneous standard of review to a district court's findings of fact and credibility determinations on jury misconduct, *United States v. Matta-Ballesteros*, 71 F.3d 754, 765-66 (9th Cir.1995), and the Second Circuit, in a case after *Thomas*, wrote that a district court's finding regarding a juror's misconduct "is a finding of fact to which appropriate deference is due." *See United States v. Baker*, 262 F.3d 124 (2d Cir.2001).

standard applies to a district court's decisions involving juror misconduct. *See, e.g., United States v. Yonn*, 702 F.2d 1341, 1344-45 (11th Cir.1983). Furthermore, because the demeanor of the pertinent juror is important to juror misconduct determinations, the district court is uniquely situated to make the credibility determinations that must be made in cases like this one: where a juror's motivations and intentions are at issue. *See United States v. Gabay*, 923 F.2d 1536, 1543 (11th Cir.1991) (district judge is in a position to observe jurors on a daily basis and listen to their pledges to deliberate fairly and is therefore in the best position to judge demeanor of jurors). *Cf. Owens v. Wainwright*, 698 F.2d 1111, 1113 (11th Cir.1983) ("Appellate courts reviewing a cold record give particular deference to credibility determinations of a fact finder who had the opportunity to see live testimony").[16] Thus, a district judge is required to apply the "substantial possibility" standard to his own investigation and in coming to his determination that the juror is or is not basing her decision on the sufficiency of the evidence. But, if the trial court applies this standard and determines as a matter of fact that no substantial possibility exists that the pertinent juror is basing her decision on the sufficiency of the evidence, we will review that finding only for clear error.

In this case, the district court, after an evidentiary hearing, found these facts: 1) Alfonso "was unwilling to follow the law, and [ ] was engaged in an attempt to willfully disregard the Court's instructions;" 2) "the record does not reveal a 'substantial possibility'[17] that Juror Alfonso's position was

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[16] After reading the record of the district court's inquiry in this case, we are strengthened in our view of the need to provide deference to the district court's determination of facts in situations like these.

[17] The district court relied on *Brown* and other cases which we use here today and put the term "substantial possibility" in quotation marks in his order. We accept that the district court applied the same "substantial possibility" standard that we apply today.

due to her belief that the evidence was insufficient to support a conviction as to the RICO conspiracy;" and 3) "she did not intend to follow the Court's instructions—that Juror Alfonso did not intend to apply the law as set forth in those instructions and had not changed her mind following the Court's instructions."

Briefly stated, our review of the record shows the following. All jurors agreed that early in the process Juror Alfonso, in some way, made comments that she did not have to follow the law and that the court's instructions were only advisory and not binding on the jury.[18] After this information came to light, the trial court gave more instructions about the jury's duty to apply the law and to obey the court's instructions. After this additional instruction, Alfonso made no more direct statements about her intention not to follow the law. The majority of the jurors, however, said that she still was not engaged in deliberations, would not consider evidence nor discuss the applicable law. Some jurors indicated that they were outraged by Alfonso's decision to do her nails during deliberations.[19] The trial court—sometime after having given its additional charge on the duty to follow the law—talked to each of the jurors, including Alfonso herself.[20] Juror

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[18] We stress that the other jurors testified that Juror Alfonso actually *said* she was not going to follow the law, not simply that they *believed* Juror Alfonso was not following the law.

[19] Although we are not deciding today to what degree a juror's duty to deliberate requires her to be actively engaged in debate, we do believe that, when a district court is investigating the possibility of impermissible nullification by a juror and when that juror has said at an earlier time in deliberations that she need not follow the law or the judge's instructions, a later display of unwillingness to deliberate or to engage in discussion is something the court can take into consideration in determining the credibility of the pertinent juror's claims that she is now applying the law and obeying the instructions of the court.

[20] We conclude that Defendants' argument that the district court's inquiry so tainted the jury pool as to make a fair trial impossible is

Alfonso's own testimony on her commitment to following the law was not certain. We accept that the record supports the district court's skeptical view of Juror Alfonso's answers to its questions and that the district court's findings about Alfonso's intentions are supported by the record.

This record shows that the district court's determination that Juror Alfonso was not basing her decision on the sufficiency of the evidence was not clearly erroneous, even in the light of a beyond a reasonable doubt standard. Because the district court applied the correct standard—no substantial possibility that the juror was basing her decision on the sufficiency of the evidence—we conclude that it was no abuse of discretion for the trial court to dismiss Juror Alfonso.

CONCLUSION

In regard to Abbell and Moran, we have concluded that the government presented sufficient evidence to sustain their convictions on both money laundering conspiracy (Count IX) and RICO conspiracy (Count I). The district court's judgment of acquittal for Defendants on the RICO conspiracy charge must be vacated and Defendants' convictions for

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without merit. The record shows the court proceeded with extreme caution to protect the integrity of the jury process. Moreover, the court instructed the jury after Alfonso's dismissal that his dismissal should not affect their deliberations. To find much fault with the inquiry in this case would unduly hinder a district court's ability to detect and rectify a juror's refusal to obey her duty in applying the law to the case and obeying the court's instructions. *See United States v. Harris*, 908 F.2d 728, 733 (11th Cir.1990) (district courts have broad discretion in determining the proper investigative procedure for looking into alleged juror misconduct). We do, however, caution district courts to be careful about invading the secrecy of the jury's deliberations and to err on the side of too little inquiry as opposed to too much.

RICO conspiracy must be reinstated. Defendants' sentences are vacated in their entirety and remanded to the district court for resentencing.[21]

AFFIRMED in PART and REVERSED in PART and REMANDED.

[21] Because Defendants' sentences have been vacated in their entirety and remanded to the district court for resentencing consistent with this opinion, we need not address the government's sentencing arguments.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed May 5, 1999]

Case No: 93-0470-CR-HOEVELER

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL ABBELL, WILLIAM MORAN, *et al.*,
Defendants.

ORDER DENYING MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNT IX, GRANTING MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNTS III AND IV, AND SCHEDULING HEARING AS TO COUNT I

THIS CAUSE is before the Court on Defendant Moran's Renewed Motions for Judgment of Acquittal, filed July 22, 1998; and Defendant Abbell's Rule 29(c) Motion on Count IX, filed September 18, 1998. Both Defendants also argued oral motions under Rule 29, Federal Rules of Criminal Procedure, at the close of the United States' presentation of evidence in this case in June 1998. The Court reserved ruling on the motions, taking them under advisement.

On July 20, 1998, the jury convicted both Defendants as to Counts I (RICO conspiracy) and IX (money laundering conspiracy), but was unable to reach agreement as to Counts III (conspiracy to import) and IV (conspiracy to distribute cocaine) of the Fourth Superseding Indictment. Defendants renewed their Rule 29 motions as to all Counts.

Upon a motion for judgment of acquittal, the Court must view the evidence in the light most favorable to the government, and draw all reasonable inferences in its favor, to determine whether "the evidence is sufficient to sustain a conviction". Rule 29(a), Fed. R. Crim. P. In the event of a conviction, that judgment should be affirmed if "any reasonable construction of the evidence allowed the jury to find [defendant] guilty beyond a reasonable doubt." *United Stales v. McKinley*, 995 F.2d 1020, 1025 (11th Cir.1993). Having reserved the decision as to the initial motions, I must decide those motions on the basis of the evidence at the time the ruling was reserved. Rule 29(b). However, the renewal of the motions at the end of the case allows the Court to consider the full record.

This case previously was tried before a jury, during a five month period in 1997, which resulted in acquittals as to the substantive RICO charge against both Defendants, and a mistrial as to Counts I, III, IV, and IX. Defendants, both of whom are charged with conduct which allegedly occurred while they were practicing attorneys, were tried along with four alleged narcotics traffickers during the first trial. Prior to commencement of the retrial, this Court denied Defendants' motions for judgments of acquittal as to these four Counts, *Corrected Order Denying Motions for Judgment of Acquittal and Denying Defendant Abbell's Motions to Dismiss*, February 10, 1998, finding that the United States had presented sufficient evidence during the first trial to support the allegations in each of the four Counts. The second trial, which began in April 1998 and concluded in July 1998, proceeded only against these two Defendants, and differed significantly in both the quantity and quality of evidence presented.

As the Court previously found as to Count IX, the United States presented sufficient evidence to support the allegations of a money laundering conspiracy under 18 U.S.C. § 1956(h).

Id., at pp. 3-4. According to the verdict form, the jury found that the Defendants each "conducted the alleged transaction with the knowledge and intent to 'conceal' or disguise the nature, the location, the source, the ownership, or the control of the proceeds of unlawful importation and/or distribution of cocaine". Thus, the jury convicted the Defendants according to the substantive violation specified in 18 U.S.C. § 1956(a)(1)(B)(i), i.e., the "concealment" aspect of money laundering. Defendant Abbell specifically argues that he did not know that the property involved in the transaction represented the proceeds of unlawful activity. Further, Defendants argue that the lack of evidence of concealment and the alleged propriety of the specifically charged financial transactions entitles them to an acquittal. The Court concludes that, based upon the evidence presented, the jury could have found the essential elements of a money laundering conspiracy. The motions as to Count IX are hereby DENIED.

As to Counts III and IV, Defendants assert that the United States must present specific proof to support these conspiracy charges. They argue, convincingly, that these charges each stand alone and that the United States is required to present evidence which would persuade a reasonable jury that these Defendants were complicit in planning the importation and the distribution of approximately 200,000 kilograms of cocaine beginning in 1983 and continuing until the date of the indictment. No evidence was presented by the United States which would suggest that either of the Defendants either directly or indirectly planned to commit such crimes with the persons actively involved in the importation or distribution. Neither *Pinkerton v. United States*, 328 U.S. 640 (1946), nor the jury findings as to Count I can be of help to the United States. While an argument can be made that the Defendants (both of whom are attorneys) might be responsible for the enterprise's drug activities because of their alleged complicity in (participation in the conduct of the affairs of) the enterprise under Count I, that argument must fail as to Counts III and

IV—each of which stand alone and require proof of direct participation in the alleged conspiracies. If, indeed, the United States offered such proof and if these and other reasonably anticipated crimes grew out of such conspiracy, *Pinkerton* might well apply. That theory cannot, however, be applied in reverse to implicate the Defendants in conspiracies in which they had no direct or even indirect connection.

I note here that I had rejected a similar defense argument at the conclusion of the first trial which involved six defendants and approximately four months of testimony. Because of the mistrial as to Counts III and IV these Counts were tried again. I will not attempt a comparative analysis of the evidence presented in the two trials except to say that there was a difference in quantity and direction. Additionally, there is a likelihood that my view of the evidence to support Counts III and IV as to these Defendants in the first case may well have been in error. In any event, after careful consideration of the evidence presented in the second trial, I conclude that Counts III and IV should be dismissed. The Rule 29 motions made on behalf of Defendants Abbell and Moran as to Counts III and IV are hereby GRANTED.

As to Count I, Defendants Abbell and Moran are charged with participating in a RICO conspiracy by operating as advisors, not merely as lawyers, who engaged in conduct which obstructed justice and furthered the affairs of the enterprise. After substantial review of the caselaw, including *United States v. Salinas*, 522 U.S. 52 (1997); *Reves v. Ernst & Young*, 507 U.S. 170 (1993); and *United States v. Starrett*, 55 F.3d 1525 (11th Cir. 1995), the Court has determined that further argument on this matter will assist the Court.

The parties shall direct their arguments toward the existence (or lack) of record support for a finding that Defendant Abbell and Defendant Moran conspired to conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise. Whatever semantics are used in discussing

the relationship of 18 U.S.C. § 1962(c) and (d), settled conspiracy law requires that the accused wilfully agree to do what would be a violation of the substantive statute if carried out. To require anything less would be to create an anomaly—a conspiracy statute which permits conviction where the conspirator did not intend to participate in a way which, if carried out, would have violated the substantive statute. Thus, it can be argued that it is essential under § 1962(d) that the United States must prove, among other elements, that the Defendants intended to participate in the management and control of the enterprise at some level and to further its objectives. If this is not the case under § 1962(d) then subsection (d) has been turned into an aiding and abetting statute, and the penalties for violation should apply only to those crimes which were committed or intended to be committed by the particular defendant. To state it differently, neither conspiracy theories of shared responsibility nor *Pinkerton* application should have any role in considering the proof of the enterprise's crimes which the evidence demonstrates are distinct from the predicate acts or intentions attributed to the defendants.

A hearing an this matter will be held at 1:30 p.m. on Tuesday, May 25, 1999. Prior to the hearing, the parties shall file proposed findings supporting their respective positions on this matter (no joint submissions will be accepted), with citations to the trial transcript and to specific exhibits. All submissions are due no later than May 20, 1999. Sentencings, which shall immediately follow the hearing, shall be scheduled by separate notice.

DONE AND ORDERED in chambers in Miami, Florida, this 5th day of May, 1999.

/s/ William M. Hoeveler
WILLIAM M. HOEVELER
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
William Pearson, AUSA
Edward Ryan, AUSA
William Asbill, Esq.
Holly Skolnick, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[Filed May 5, 1999]

Case No: 93-0470-CR-HOEVELER

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL ABBELL, WILLIAM MORAN, *et al.*,
Defendants.

ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL

THIS CAUSE comes before the Court on Defendant Abbell's Motion for New Trial based on the dismissal of Juror Alfonso, filed September 29, 1998 (which was adopted by Defendant Moran), and Defendant Moran's Motion for New Trial based on newly discovered evidence of jury misconduct by Juror Blanton, filed November 23, 1998 (which was adopted by Defendant Abbell). The Court held a hearing on this matter on December 2, 1998.[1]

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[1] Defendant Moran also filed a Motion for New Trial on July 23, 1998, arguing that the United States improperly promised things of value to witnesses in exchange for their testimony. *United States v. Singleton*, 144 F.3d 1343 (10th Cir.1998), *vacated, reh'g en banc*, 165 F.3d 1297 (10th Cir.1999). Based on the reasoning cited by the Tenth Circuit in the opinion vacating the panel decision in *Singleton*, Defendant Moran's Motion is denied.

BACKGROUND

Defendants Abbell and Moran were indicted in this case in June 1995. Lengthy pretrial proceedings, including the appointment of a Special Master to review thousands of documents seized from the two Defendants' law offices, resulted in a substantial delay before trial commenced in April 1997. After five months in trial, including approximately twelve days of deliberations which ended in October 1997, a mistrial was declared as to these two Defendants regarding Counts I (18 U.S.C. §1962(d), RICO conspiracy), III (21 U.S.C. §963, conspiracy to import cocaine), IV (21 U.S.C. §846, conspiracy to distribute cocaine), and IX (18 U.S.C. §1956(h), conspiracy to launder money). The case as to four other Defendants was resolved during the first trial. The retrial of Defendants Abbell and Moran commenced in mid-April 1998, with closing arguments presented to the jury at the end of June.

After instructing the jury on Wednesday, July 1, *Transcript* (hereinafter "*Tr*") at 8353-8426, and following a four day break for the July 4th holiday, deliberations commenced on Monday morning, July 6, 1998. On Thursday morning, July 9, the jury had been deliberating for a total of approximately 20 hours when one of the jurors presented the Court with a note [2] requesting assistance. The note, presented by Mr. Gooden and signed by the jury foreperson, Ms. Sebastian, states that one of the jurors had "formed an unwavering opinion—prior to, inspite [sic] of and irregardless [sic] of the evidence presented" and that the indicated juror was "unwilling or unable to review, read or view exhibits" contrary to that juror's opinion.[3]

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[2] The notes from the jury have been made a part of the record in this case.

[3] Later investigation revealed that the note may have been written the night before and was not presented to the entire jury prior to submission to the Court. *Tr* at 8942, 8946-47, 8969.

Concerned about the statement that such opinion had been formed "prior to" the presentation of evidence, and after consultation with counsel, the Court decided to interview the jury foreperson in chambers, on the record, with counsel and the Defendants present. This interview took place at approximately 10:15 a.m. on Thursday, July 9. In response to the Court's inquiry, the foreperson indicated that the identified juror made a statement of her opinion "right at the beginning of deliberations", *Tr* at 8545, and that, according to the juror's own statement during the first day of deliberations, her mind was made up "the minute [she] walked out of the jury box" without any deliberations. *Tr* at 8549-50. While this reported failure to deliberate was cause for concern, the Court—without more—would have been reluctant to invade the jury composition. However, during this same interview with the jury foreperson, the Court was informed that the same juror had said earlier that morning that Count I, the RICO conspiracy charge, was a "stupid law and we don't have to regard it". *Tr* at 8546-47.

The Court then met with counsel and the Defendants, and discussed the difficult situation presented. Later that afternoon, after studying the decisions in *United States v. Geffrard*, 87 F.3d 448 (11th Cir.1996) (affirming lower court's dismissal of juror whose religious beliefs prohibited her from following court's instructions), and *United States v. Thomas*, 116 F.3d 606 (2d Cir.1997) (reversing lower court's dismissal of juror since record did not establish beyond doubt that juror's position was result of unwillingness to apply the law), the Court instructed the jury (including excerpts of the decision in *Thomas*) regarding their duty to follow the law and consider all of the evidence in the case. They were also instructed to tell the Court if anyone among them was unwilling or unable to follow the law, by sending a note saying that "I simply cannot [follow the instructions]"—and the jurors were assured that there would be no recrimination.

Tr at 8612-17. About an hour later, the jury was dismissed for a three day weekend (due to a juror's scheduling problem court was not convened on Friday, July 10).

At 8:45 a.m. on Monday, July 13, one of the jurors gave court personnel an unsigned note stating that the jury was "hopelessly dead locked [sic]" and "can not reach a verdict". The note was returned for the signature of its author and/or the jury foreperson. The note then was signed by Ms. Alfonso and the foreperson, Ms. Sebastian. At 10:10 a.m., ten members of the jury (not including Ms. Alfonso and Mr. Blanton) submitted a signed note referencing the earlier note and stating that it was the "consensus of the rest of the jurors that we are opposed to this statement [that we are deadlocked]". (It later was determined that the unsigned note had been prepared and submitted by Juror Alfonso, the same juror who had advised the other jurors that the RICO law was a "stupid" law and that they need not follow it or the Court's instructions.) After lengthy discussions with counsel the Court determined that a colorable basis for further investigation was presented by the information the Court had received. Both Eleventh Circuit precedent and the procedures discussed in *Thomas* indicated that a more complete investigation was in order.

The Court then interviewed the foreperson again, who reported that the identified juror still was not participating in deliberations. *Tr* at 8701-8703. Thereafter, the Court interviewed Mr. Gooden, the author of the original note who had suggested that the juror made up her mind before deliberating and perhaps prior to the completion of the presentation of evidence. Juror Gooden reported that on the prior Wednesday or Thursday the juror said that the instructions[4] were a "'guide' and not the law" and that after the Court's re-instruction on Thursday afternoon the juror said she's "having a hard time understanding" the law. He also

[4] Each juror was given a copy of the instructions.

stated his belief that there was a language barrier. *Tr* at 8749-50. He added, by way of clarification of his original note, that the juror did not say she had discussed the case before deliberating. *Tr* at 8752.

On Tuesday morning, July 14, the Court again interviewed Ms. Sebastian, who reported that the identified juror still was not participating in deliberations, and that the juror had been "sitting" over the past four or five days and presently was "[doing] her nails". *Tr* at 8802. Further, Ms. Sebastian indicated that the juror announced "blanket statements" regarding a "decision having been made", which applied to all Counts of the indictment. *Tr* at 8803, 8808. The Court then interviewed Mr. McSwiggan, who said that the juror in question stated prior to the Court's re-instruction that she "doesn't care what the law is, she is going to follow her feelings". *Tr* at 8813. In addition, Juror McSwiggan noted that the juror "had her back up and really didn't want to participate too much after [the Court] had talked to us [on Thursday]". *Tr* at 8814.

At this point counsel for the United States suggested that the Court interview Juror Alfonso. Counsel for Defendant Abbell, while maintaining an objection to the process of the investigation [5], suggested that the Court interview the other juror, besides Juror Alfonso, who did not sign the second note, i.e., the note disagreeing with the statement about a deadlock. Accepting that suggestion, the Court then interviewed Mr. Blanton, who stated that the identified juror said on at least three occasions, starting on the first day of deliberations, that "we didn't have to follow instructions". *Tr* at 8819. He reported that on one day "several days into it", the juror spoke for an hour and a half about "her whole version of reality" without discussing any of the evidence in the case. *Tr* at 8821, 8825.

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[5] As noted by the Court, all parties' objections to the process were preserved. *Tr* at 8817.

The next juror to be interviewed was Ms. Doll, who stated that the identified juror said she "[didn't] have to follow those guidelines", and that the Court's re-instruction on Thursday "made no difference", and the juror just "disregarded [the law]". *Tr* at 8828. At the conclusion of this interview, counsel presented their arguments regarding the scope of the Court's proposed examination of Juror Alfonso.

At approximately 12:30 p.m. the Court interviewed Juror Alfonso, who admitted that she sent the note about being deadlocked without letting the other jurors know. *Tr* at 8848. She advised the Court that at one point she felt another juror made "threats" to her that she would have to face the press if she didn't vote a particular way. Juror Alfonso produced a copy of a poem and indicated that the author, later identified as Juror Blanton, was pushing for one result of only two options (presumably guilt as opposed to innocence), and that the third option (presumably a mistrial) was not even being considered. *Tr* at 8854.

Juror Alfonso also noted that she had been accused of not wanting to follow the instructions (which she stated were "not everything" that must be taken into consideration). *Tr* at 8849. She acknowledged on several occasions that she told the other jurors that the law wasn't the "only" thing that the jury must follow, and believed that she must use her "common sense". *Tr* at 8850, 8852, 8856, 8865. While she denied ever saying that Count I represented a "stupid" law, *Tr* at 8854, she volunteered that she did "have a problem with the federal law", perhaps as a result of having worked for many years "with the criminal law". *Tr* at 8852. (According to the juror questionnaire she completed prior to trial, Ms. Alfonso had served fourteen years as a correctional officer.[6]) In addition, she said that "this [law] doesn't make sense . . . on the other hand it is not only like you say." *Tr* at 8852.

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[6] Each of the jurors completed a 33 page questionnaire prior to trial. The questionnaires are a part of the record in this matter.

Despite Juror Alfonso's assertion that she understood that the law must be followed and felt "like [she had] been following the law", *Tr* at 8864, when the Court asked directly whether she said that she didn't have to follow the law, she responded "Okay. That's not the only thing that I have to do. . . . that's not everything that I say." *Tr* at 8856. Later, again in response to the Court's specific questioning as to whether she stated that the law is "just advisory", she answered "[e]xactly like that, no, Judge. I say [sic], 'This is not everything'. . . . We have to take into consideration a lot of things here." *Tr* at 8865.

On several occasions Juror Alfonso reported that "it is not 11 to 1, or whatever" and that she was not alone. *Tr* at 8848, 8850, 8859. She also suggested that the Court interview the rest of the jurors. *Tr* at 8871. Juror Alfonso indicated that the other jurors could "speak better than [she]" and that they could "read better than [she]". *Tr* at 8859-60. Juror Alfonso concluded with the statement that if the Court wanted to discharge her, she was "more than happy to leave." *Tr* at 8866. While at several points she asserted that she was deliberating, when asked the direct question as to whether she told the other jurors she did not have to follow the law, she did not—as indicated above—answer directly. She did concede that "[t]hat's part of what I say [sic]". *Tr* at 8856.

At the conclusion of this troubling interview I discussed the matter with counsel and decided to give further consideration to the Government's request that Ms. Alfonso be discharged—a request which both Defendants opposed. I also denied the motions for mistrial which were made at the time. The following morning, Wednesday, July 15, interviews of the remaining six jurors commenced.

The Court first interviewed Ms. Grant, who reported simply that "we've all been participating" in deliberations. *Tr* at 8935. Juror Grant confirmed Juror Alfonso's report that a

juror had suggested that names would appear in the newspaper, but noted that such disagreements were all resolved and that things now were "fine". *Tr* at 8937-38.

The next juror interviewed was Ms. Mandell, who began by stating that one juror "was not willing to consider anything" and that the juror "[had] not said anything in a couple of days." *Tr* at 8940-41. Juror Mandell didn't know if the juror "[understood] the language that is written on the pages". *Tr* at 8941. Juror Mandell observed further that since the re-instruction on Thursday, the juror in question "really has not said anything. She has voted, but she has not said anything Monday, Tuesday or Wednesday." *Tr* at 8943. Ms. Mandell also noted that the identified juror stated that she "couldn't go by the way this law was written" and that she "came in with her mind made up" and also was "very angry" about the Thursday re-instruction. *Tr* at 8941-42. Juror Mandell reported that the juror had given the others "lip service that she is willing to [listen to the law]", but also said that she "did not believe the law" and "did not accept the way it was written". *Tr* at 8941, 8944.

The Court then interviewed Mr. Rosso, who noted that the juror said at the beginning of deliberations that the instructions were "from the Judge" and were "not the law". *Tr* at 8951. Juror Rosso also reported that the juror was not participating in deliberations and was "doing her nails", and that he was "outraged" by what she was doing. *Tr* at 8953.

The next juror to be interviewed was Ms. Peralta. When asked if the juror said, in one way or another, "that it was not necessary to follow the Court's instructions on the law", Ms. Peralta responded: "Yes". Juror Peralta asserted that this was said at some time "during the first week" and "[p]robably around the second day", "[m]aybe also the third day". *Tr* at 8958. The juror "had the wrong understanding of what the difference was between jury instructions and instructions of how to get to I-95 [(a major interstate highway)]", and

thought that the jury instructions were more like the latter. *Tr* at 8958-59. She also stated that the juror said the jury instructions were "just the Judge's instructions. . . . I can get instructions from somebody on how to get to [a local department store]." *Tr* at 8959. Juror Peralta also reported that Alfonso became "not as talkative" after the re-instruction the previous Thursday, *Tr* at 8960, and had not considered the evidence presented by "the other side", *Tr* at 8963. When asked if the juror "[had] said at any time anything that would indicate that she has come off that feeling that these instructions are just like trying to find a road or a mine", her answer was "[f]rom what I can recall, no, not really". *Tr* at 8960.

The Court then proceeded to interview Ms. Cortes, who said that the juror said that she "was not going to follow the laws". *Tr* at 8968-69. Juror Cortes noted that she "sat with [Alfonso] and read it over" and didn't know if the juror "fully understand [sic] what she is reading". *Tr* at 8972. She reported that Juror Alfonso previously discussed the evidence, although only as to one side. *Tr* at 8974.

Finally, the Court interviewed Mr. Butler, who stated that the juror asserted that she "works in law enforcement" and that "certain laws don't apply" and that what the Court said "was not the law". *Tr* at 8977-78. He also noted the juror's attempt to introduce her experience in the jails system as a corrections officer, apparently as being relevant to the deliberations. *Tr* at 8986. Juror Butler reported his impression that Juror Alfonso was saying "that the law that [the Court] read to us was wrong in her—you know, in her words." *Tr* at 8977. He also noted that she apparently didn't understand the "rules of the law" that the Court provided, *Tr* at 8976, and that she stated that she "don't [sic] need to follow the laws to come to a unanimous or rather a reasonable verdict", *Tr* at 8977, but yet she insists that she is following the law. *Tr* at 8984. Juror Butler emphasized that he was "not saying that

she's a bad person, or anything", *Tr* at 8976, and that the jurors "don't dislike anyone", *Tr* at 8986. Juror Butler thought that Juror Alfonso was "actually listening" and now deliberating. *Tr* at 8980-81, 8983.

Again I met with counsel for lengthy discussions as to the proper approach to the knotty problem presented, and announced my decision to study the problem in greater detail prior to announcing any decision. Two notes came in from the jury shortly thereafter: 1) Does the defense have a right to see any of the seized evidence after it is in the government's possession? and 2) Could we get a copy of Douglas Hartman's portion of the transcript? The Court addressed these two matters with counsel.

Later that same afternoon, at approximately 3:30, the Court received a note from Ms. Grant, stating "I quit". The Court met with Juror Grant, with counsel present, who stated that she didn't want to be "handled and mistreated", but expressed hope that she would feel better the next morning. *Tr* at 9056. The Court then met briefly with Juror Sebastian, who asserted her opinion that Juror Grant was tired and frustrated like all the other jurors, and that one juror still was not participating. *Tr* at 9059.

That evening and the next morning (Thursday, July 16) the Court reviewed the transcript of Juror Alfonso's interview and studied the pertinent caselaw. As I announced to counsel that morning, I concluded that Juror Alfonso "simply was not answering my questions about her ability to follow the law or her willingness to do so", and that she should be removed for just cause. *Tr* at 9077-80. This decision was reached only after a consideration of the statements of all the jurors. Defense counsel moved for a mistrial, *Tr* at 9088-89, which the Court denied. The Court then advised Juror Alfonso that she was excused from further participation. She thanked the Court for excusing her. *Tr* at 9093. It was later discovered, as

court personnel attempted to confirm Ms. Alfonso's contact information, that she was starting a family vacation in the Florida Keys on Saturday, July 18. *Tr* at 9173.

Before the Court announced the decision to discharge Juror Alfonso, a note was received from the foreperson indicating that Juror Grant did not want to continue. After excusing Juror Alfonso, the Court met with Juror Grant with counsel present. She stated that she didn't feel she should be "beat up on", and that it was as if "somebody wants to . . . wear you down". *Tr* at 9102, 9104. She asserted that no physical abuse was occurring and no racially derogatory remarks were being made, *Tr* at 9103-04, and confirmed her desire to remain with the jury.

At approximately 10:45 a.m. on Thursday, July 16, the Court instructed the remaining eleven jurors that Juror Alfonso was excused because "there were certain things about her views of the jury process and also her own feelings" and that she was "unable to serve as a juror on this case". *Tr* at 9118-19. I instructed the jury that the dismissal of Juror Alfonso had "absolutely nothing to do with how I may view this case and how it should come out." *Tr* at 9119. Further, I re-instructed the jury as to reasonable doubt and reminded them of their right to disagree and the need for them to respect each other. *Tr* at 9117-18, 9122-23. The Court also specifically inquired of each juror whether he or she could "continue your deliberations fairly and impartially". *Tr* at 9134-35. Each juror responded affirmatively.

At this time, the foreperson indicated that the request for the review of the Hartman testimony was made by Juror Alfonso and, thus, was moot. However, Juror Peralta indicated that she would like to hear the testimony and, accordingly, the testimony was read aloud. *Tr* at 9130. Counsel for Defendant Abbell then suggested that the request for testimony indicated that Juror Alfonso had been participating and that the Court's dismissal of her was improper.

At approximately 2:45 p.m. on Friday, July 17, the jury submitted a note stating that they had "reached a unanimous verdict on one count for both defendants", and had made "significant movement" but "can not come to a unanimous decision" on the other three Counts as to both Defendants. It subsequently became clear that they had reached a decision as to Count I—RICO conspiracy—at this point. (The verdict form accepted the following Monday indicated a date next to each of the Counts, apparently reflecting the date on which the specific Counts were resolved.) After discussing the matter with counsel, the Court briefly questioned the jury through the foreperson and determined that it would be proper to have the jury return the following Monday to "try a bit longer". *Tr* at 9226. A formal *Allen* charge was not given at the time. The verdict form was kept under seal.

On Friday, July 17, 1998, the Court was faced with the disappearance of Defendant Moran from the courthouse. As a result of the publicity in the media during the weekend regarding that event, the Court questioned the jury when they reconvened the following Monday, July 20, about whether they had been exposed to anything in the media about this case. The six jurors who reported that they had learned of the event through the media were individually interviewed (Jurors Doll, Rosso, Grant, Cortes, Blanton, and Sebastian). *Tr* at 9253, 9262-72. The Court denied motions for mistrial which were made by the Defendants, finding that the jurors could continue to deliberate and give the Defendants and the United States a fair trial.

That afternoon, July 20, the jury submitted a note indicating that a decision had been reached as to two Counts and that further deliberations would not result in unanimous decisions on the remaining two Counts. The Court published the verdict (now also finding Defendants guilty as to Count IX—money laundering conspiracy) and declared a mistrial as to Counts III and IV. Each of the jurors responded

affirmatively to the question as to whether this was their verdict. The jurors were discharged upon their return on Friday, July 24, 1998, after counsel reached an agreement to proceed before the Court as to the forfeiture allegations.

Defendants filed their motions for new trial based primarily on the Juror Alfonso dismissal, but also arguing that Juror Blanton was operating under a conflict of interest. Defendants appear to suggest that Juror Blanton intended to write a book about the trial and possibly may have been conducting independent research regarding the Defendants during the trial. Defendants offer a letter from Blanton to the other jurors, dated August 15, 1998, in which he references his book plans and a memo of the same date in which he is providing "Updates from research". *See* Exhibits D, E, *Motion for New Trial Based on Newly Discovered Evidence*, filed November 23, 1998. There has been no evidence presented that he was doing research before or during his service as a juror and no basis other than mere speculation to support a post verdict investigation. Juror Blanton reported on his jury questionnaire that he was employed as a technical writer, and also employed by M.D.C.C. (Miami-Dade Community College). According to the memo dated August 15, Mr. Blanton teaches part-time at MDCC. Counsel for Defendant Moran, in an affidavit, states that Ms. Alfonso contacted counsel's office after the trial and provided a copy of the above referenced letter and memorandum. *See* Exhibit B, *Motion for New Trial Based on Newly Discovered Evidence*, filed November 23, 1998. As explained below, I find no basis whatsoever in this effort to disturb the verdict.

ANALYSIS

This Court must approach the jury and its deliberative process with regard for its sanctity. "It is the historic duty of a trial judge to safeguard the secrecy of the deliberative process that lies at the heart of our system of justice . . . ." *United*

States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997) (noting constraints on court's investigation of alleged misconduct). Nevertheless, allegations of juror bias or misconduct must be addressed [7] and, in the proper circumstances, a juror may be excused for "just cause". Fed. R. Crim. P. 23. Just cause may be found as a result of a juror's illness or physical unavailability, *United States v. Wilson*, 894 F.2d 1245, 1250 (11th Cir.1990) (affirming dismissal after first week of deliberations of pregnant juror who had been sick throughout trial and had disabling dental pain at time of dismissal), or due to the juror's inability to perform her duties impartially, *United States v. Geffrard*, 87 F.3d 448 (11th Cir. 1996) (affirming dismissal of juror during deliberations whose religious beliefs compelled her to write to judge expressing disagreement with case and stating her belief that defendant was entrapped—despite instruction that entrapment did not apply).

In the Eleventh Circuit, a trial judge has "broad discretion" in determining the proper investigative procedure to be used when faced with an allegation of juror bias or misconduct. *United States v. Harris*, 908 F.2d 728, 733 (11th Cir.1990). The decision of how extensively to investigate such allegations must be guided by both the seriousness of the accusation, *Harris*, 908 F.2d at 734 (affirming trial court decision not to investigate two ambiguous remarks made by individual jurors), and the certainty of the allegation, *United States v. Caldwell*, 776 F.2d 989, 997 (11th Cir.1985) (collecting cases) (affirming decision not to conduct full investigation as to allegation made by anonymous caller).

The most serious accusations generally fall into one of two categories: allegations of bias which relate to a juror's status, e.g., as a person with some connection to the case or the parties through either an event or relationship, and those

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[7] A federal judge . . . may not ignore colorable claims that a juror is acting on the basis of . . . improper considerations." *Thomas*, 116 F.3d at 616.

which relate to a juror's opinion or particular view, e.g., as a person who believes that marijuana should be decriminalized. The nature of the alleged misconduct dictates the scope of the court's investigation. For example, a judge clearly may inquire as to whether a particular juror engaged in a specific act, such as attending the same church as the prosecutor in the case—without a risk of invading that juror's thoughts on the merits of the case—to establish whether that juror can remain impartial. *United States v. Barker*, 735 F.2d 1280 (11th Cir. 1984) (affirming dismissal at beginning of deliberations of juror who put hand on Defendant's shoulder and smiled). On the other hand, investigation regarding a juror's allegedly biased viewpoint must proceed cautiously, for example, as the inquiry regarding a juror's reported statement that doctors are thieves might be intertwined with the merits of a case which involved doctors as defendants. "The judge's decision whether to interrogate the jury about juror misconduct is within his sound discretion, especially when the alleged prejudice results from statements made by the jurors themselves, and not from media publicity or other outside influences." *Grooms v. Wainwright*, 610 F.2d 344, 347 (5th Cir.1980) (affirming decision not to fully investigate juror's biased statement allegedly overheard by mother of defendant).

There are few reported decisions addressing the proper method of investigating allegations of a juror's unwillingness to follow the law or a juror's expressed intent to disregard the court's instructions. The Court of Appeals for the Second Circuit, in the decision in *Thomas*, expressly concluded that dismissal for refusing to follow the court's instructions is permitted under Rule 23(b), but found error in the trial judge's dismissal of a juror since the juror never said he was "unwilling" to follow the law, and the record evidence raised a possibility that the juror was attempting to follow the law. In *Thomas*, there were a number of complaints from other jurors during deliberations regarding the subject juror's intent

to acquit regardless of the evidence, but some jurors said the juror was relying on an assessment of the evidence—including the testimony of witnesses for the prosecution. *Id.* at 611. The juror himself said nothing to the trial judge to indicate that he was unwilling to follow the court's instructions and, indeed, "assured the court that his vote was based on his view of the evidence". *Id.* at 623. The Second Circuit held that the investigation—which should be limited if deliberations have begun—must reveal beyond all doubt that a juror refuses to apply the law.[8] The Second Circuit cited with approval the holding of the Eleventh Circuit in *Geffrard* (affirming dismissal of juror whose religious beliefs were in conflict with her duties), and explicitly adopted the rule of the Court of Appeals for the District of Columbia in *United States v. Brown*, 823 F.2d 591 (D.C. Cir.1987) (finding error in dismissal of juror dissatisfied with Government's evidence). The decision in *Brown* addressed whether it was proper to dismiss a juror when the record reflected a "substantial possibility", 823 F.2d at 596, that the juror's request to be dismissed was due to his belief that the evidence was inadequate to support a conviction. The juror in that case expressed his concerns to the judge regarding the "way the RICO conspiracy act reads", 823 F.2d at 594, and the way in which the evidence was presented. The decision in *Brown* specifically did not address whether a juror who refuses to apply the law may be dismissed under Rule 23(b).

The lesson of these cases, when studied with cases regarding other types of alleged misconduct, suggests that the trial

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[8] There had been previous complaints from other jurors prior to deliberations regarding the subject juror's attempts to distract the jury. The judge interviewed each juror and decided against discharging the juror at that point. It was only after the complaints during deliberations that the judge decided to dismiss the juror. While it is unclear, the decision of the Second Circuit may imply that a juror who engages in conduct constituting "just cause" is in some sense capable of rehabilitation upon proper instruction by the trial judge.

judge must carefully weigh both the type of allegation and the point in the proceedings at which allegations of juror misconduct arise. If the misconduct occurs and the allegations arise prior to deliberations, i.e., during the presentation of evidence or closing arguments, the judge may investigate the matter fully and, if necessary, can correct the problem by replacing the offending juror with an alternate juror. *United States v. Yonn*, 702 F.2d 1341 (11th Cir. 1983) (affirming dismissal of juror during trial who said U.S. witness was a pimp and that juror believed Defendant was innocent).[9]

Investigation of alleged juror misconduct which arises after the jury begins deliberating—even if the conduct occurred prior to deliberations [10]—is governed by Rule 23(b), Fed. R. Crim. P., and rests within the judge's discretion. *Geffrard*, 87 F.3d at 452 (affirming dismissal of juror without further investigation who sent letter to the judge clearly stating an intention to disregard the court's instructions). A trial court has "considerable discretion" in determining whether to dismiss a juror on the grounds of "prejudice, misconduct or other impairment of a juror's ability to perform his duties". *Barker*, 735 F.2d at 1282-83. Clearly, however, the risk of invading the sanctity of the jury is significantly greater. "[A] court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations." *Brown*, 823 F.2d at 596.

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[9] Alternatively, the Court could proceed with eleven jurors, if the court finds it necessary "for any just cause" to excuse a juror prior to deliberations and the parties so stipulate. Fed. R. Crim. P. 23(b).

[10] *United States v. Gabay*, 923 F.2d 1536 (11th Cir.1991) (affirming decision to proceed with eleven jurors, after discovery of information during deliberations that twelfth juror told co-workers during trial that she thought Defendant was guilty). The Eleventh Circuit's decision in *Gabay* specifically did not address whether "just cause" existed for dismissal of the juror, since neither party argued that issue to the appellate court.

Investigation after the receipt of the verdict is circumscribed indirectly by the restrictions imposed on the use of juror testimony to impeach a verdict. Fed. R. Evid. 606(b).

The juror Alfonso issue

The discharge of Juror Alfonso was necessitated by my determination that she was unable to perform her duties impartially. The investigation relating to her alleged misconduct revealed a person who was unwilling to follow the law, and who was engaged in an attempt to willfully disregard the Court's instructions. I came to that conclusion after interviewing each of the jurors, and as a result of the other jurors' relatively consistent allegations that she had indicated her intent to disregard the law and the Court's instructions as applied to the facts of this case. I concluded that the allegations of her misconduct were supported, and that a sufficient basis existed to discharge her for "just cause".

As the Court noted at the time, the problem was thrust upon the Court by Juror Gooden's note—which was improvident in that it was not presented to the entire jury. The allegations of misconduct having been made, however, the Court was compelled to commence an investigation. The subject of the original investigation, i.e., whether the juror had made up her mind "prior to" considering the evidence, was abandoned in light of Juror Gooden's clarification of the matter. In the process of beginning the original investigation the Court learned of the juror's intent to disregard the law—at least as to RICO. It later appeared that her statements about disregarding the Court's instructions were broader than originally anticipated. In structuring the investigation, the Court gave careful regard to the rights of the parties to participate without unnecessarily invading the jury's deliberative process. Each interview was conducted on the record and with Defendants and their counsel present. *Gabay*, 923 F.2d at 1542; *Caldwell*, 776 F.2d at 1000 ("safer course may well

have been to allow the defendants to observe the inquiry of the juror"). I cautioned the jurors each time to not discuss the investigation with the other jurors.[11]

Three areas of misconduct by Juror Alfonso emerged from the investigation: her opinion that RICO is a "stupid" law, her intent to disregard the jury instructions, and her use of her position in law enforcement to influence the jury.[12]

Opinion that RICO is a "stupid" law

As the Court stated at the time, Juror Alfonso's own statements to the Court regarding her "problem with the federal law" and her belief that the law wasn't the only thing that the jury must consider, essentially corroborated the reports of the other jurors. Juror McSwiggan reported that Juror Alfonso said that she didn't care what the law was, she was "going to follow her feelings". Jurors Cortes and Butler noted that Juror Alfonso said she did not need to follow "the laws", and Juror Doll indicated that Juror Alfonso's statements revealed that she was not going to follow the law. Jurors Sebastian and Mandell specifically confirmed that Juror Alfonso did not accept the law. Juror Gooden noted that Juror Alfonso was having a "hard time understanding" RICO.

Juror Alfonso admitted that she was having difficulty with Count I (RICO conspiracy) but at no time asked the Court for an explanation of the RICO law or for assistance in understanding the application of the instructions regarding Count I. While she indicated that she had suggested such a course of action to other members of the jury, who had rejected the idea of submitting questions to the Court, *Tr* at 8867, none of the other jurors reported that such events took place. Moreover,

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[11] During the investigation deliberations were spotty at best, as the jurors were instructed to deliberate only with all twelve jurors present.

[12] In addition, it may be that Juror Alfonso's problems with comprehension and expression—perhaps due to her difficulties with the English language—were severe enough to disable her from serving on the juror.

Ms. Alfonso showed her willingness to send out a note on her own when she submitted the deadlock note, and the record is clear that other notes were submitted by the jury both before and after the investigation into these allegations began.

In sum, I conclude that the record does not reveal a "substantial possibility" that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to RICO conspiracy.

Intent to disregard the jury instructions

Several jurors reported that Juror Alfonso was not following the Court's jury instructions. Jurors Blanton and Peralta said that Juror Alfonso said the jurors didn't have to follow the instructions, and Juror Rosso reported that she said that the instructions were "from the Judge" and were "not the law". Jurors Gooden and Doll noted that Juror Alfonso said she considered the instructions as a mere guide, and Juror Peralta stated that Juror Alfonso treated the instructions as similar to instructions to a highway or store—implying that they need not be followed because alternative paths existed. I became convinced then and am again, after a review of the jurors' statements, that Juror Alfonso, regardless of some of her comments during her interview, was set on a course of disregarding the law set out in the instructions. Indeed, her comments—even if they had been less equivocal—in defense of the accusations would not be conclusive.[13] In response to allegations that a jury had been influenced by extrinsic information, the Eleventh Circuit has confirmed that a juror's denials of misconduct are an insufficient basis on which to reject a claim of misconduct. *United States v. Brantley*, 733 F.2d 1429, 1440 (11th Cir. 1984) (abuse of discretion to not conduct more complete inquiry when evidence showed that

[13] For example, the suggestion by several jurors that Juror Alfonso was considering only one side of the evidence demonstrates a disregard for the Court's instructions—despite her assertions to the contrary.

one juror reported that another juror informed jury that defendant previously had been in this kind of trouble). "[T]he bias of a juror will rarely be admitted by the juror himself . . . ." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 558 (reversing decision to grant new trial based on juror's incorrect response during voir dire since there was no showing that a correct response would have been a basis for a challenge for cause), Brennan, J., concurring.

As is evident, we spent a considerable amount of time in interviewing, research and argument. I concluded, after evaluating the comments of all the jurors that she did not intend to follow the Court's instructions—that Juror Alfonso did not intend to apply the law as set forth in those instructions and had not changed her mind following the Court's instructions on Thursday afternoon, July 9.

Use of position in law enforcement to influence jury

Juror Alfonso apparently felt that her position in law enforcement (as a corrections officer) provided her with sufficient knowledge to disregard the federal law. Juror Butler reported that Juror Alfonso made statements indicating the relevance of her experience.

Again, I felt then, and do now, that just cause had been established for the removal of Juror Alfonso pursuant to Rule 23(b). As I stated at the time, "she is apparently unwilling or incapable of following the Court's instructions". *Tr* at 9090. She said that "I know how things at the jail are . . . . [D]on't tell me the way at [sic] the things are in the jails." *Tr* at 8860.

Defense counsel were concerned throughout the proceedings that Juror Alfonso was the only juror opposing conviction. The verdicts as to Counts III and IV disprove this, and the delay in the jury reaching its verdict as to Count IX also diminishes the strength of this argument. Moreover, Juror Alfonso's own statements that she was not alone,

coupled with Juror Grant's apparent position in contrast to the majority of the jury, are sufficient to satisfy the Court that this was not a situation in which the sole holdout for acquittal was dismissed. In *Wilson*, 894 F.2d at 1250, the Court of Appeals for the Eleventh Circuit noted that the record in that case did not present the slightest basis to believe that the excused juror was a holdout or that the jury had reached any sort of impasse. This indicates the correct concern that trial courts proceed with extreme caution if it appears that the question of dismissing a juror is related to that juror's minority view as to the merits of the case. While the record before this Court indicates that an impasse was imminent, it does not indicate that Juror Alfonso was a lone voice in that room.[14] Moreover, as Juror Butler noted, the jurors didn't "dislike" anyone—which suggests that the other jurors did not harbor ill feelings toward Juror Alfonso.

Arriving at this conclusion has been difficult. Indeed, before fully reviewing the transcripts of the juror interviews and all of the caselaw in the Eleventh Circuit, I was concerned that I might be required to grant a new trial due to the Alfonso removal. However, after a full review of the transcripts and consideration of the important cases on the subject, I am convinced that the record justifies the finding of just cause. This case began with jury selection, starting on April 13, 1998, and closing arguments were completed on July 1, 1998. Because of the complexities of the case considerable pretrial work was necessary. The time spent on the jury selection process alone, including preparation of extensive interrogatories to the jurors, was considerable. The Eleventh Circuit recently has confirmed that it is proper to consider the length of time invested in a proceeding when

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[14] However, it necessarily must follow that even if the juror in question was a lone holdout for, e.g., acquittal, if just cause clearly existed, the result should be the same. The relevance of the juror's position would be in making the determination as to "just cause".

determining whether dismissal of a juror is necessary. *United States v. Spence*, 163 F.3d 1280 (11th Cir.1998) (disapproving of dismissal of juror with temporary illness during first day of deliberations after two day trial). "[The] declaration of a mistrial would have necessitated a second expenditure of substantial prosecution, defense and court resources; the outcome Rule 23(b) was designed to alleviate". *Gabay*, 923 F.2d at 1543. The history of this case, I feel, demanded a thorough investigation of the charge of juror misconduct. My initial concern, of course, was the danger of invading the sanctity of jury deliberations so carefully protected by well established law. Every effort was made to limit the inquiry to the issue at hand: Did we have a juror who was determined to disregard the law and either conclude the case on her own terms or cause a mistrial? I am convinced that we did and that she attempted both.

The juror Blanton issue

Defendants also seek a new trial based on the allegation that Juror Blanton may have been manipulating the jury for his personal benefit in order to support his efforts to write a book about the trial. This motion merits little analysis. Rule 606 of the Federal Rules of Evidence restricts jurors from testifying as to the jury's deliberations unless such inquiry concerns the effect of extraneous information or outside influence improperly brought to bear upon any juror. Thus, the ability to investigate is very limited. The factors relevant to the Court's role in investigating serious allegations of misconduct have been outlined above. The seriousness of the alleged misconduct must be considered as well as the weight of the accusation. The alleged misconduct of Juror Blanton involves events which were discovered after the trial, and there is absolutely no evidence of improper conduct prior to the end of trial. Counsel have inferred that Juror Blanton developed his ideas for a book about this case while serving as a juror. Counsel also infer, without any factual basis, that

Juror Blanton may have been providing the other jurors with outside information about the Defendants at some point during the trial. This accusation is simply unsupportable, and neither of these serious allegations has any evidentiary basis. The record does not demonstrate that Juror Blanton engaged in such conduct during the trial and counsel offers only the suggestion of Ms. Alfonso (who contacted counsel with this information) to support such allegation. The Court concludes that an insufficient basis has been shown for conducting an investigation into this matter.

For all the above reasons, it is hereby

ORDERED AND ADJUDGED that the motions for new trial are DENIED.

DONE AND ORDERED in chambers in Miami, Florida, this 5th day of May, 1999.

/s/ William M. Hoeveler
WILLIAM M. HOEVELER
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
William Pearson, AUSA
Edward Ryan, AUSA
William Asbill, Esq.
Holly Skolnick, Esq.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Feb. 5, 2002]

No. 99-12058-GG

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

versus

MICHAEL ABBELL, WILLIAM MORAN,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United Stated District Court for the Southern District of Florida

---

BEFORE: EDMONDSON, FAY and GARWOOD*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants Michael Abbell and William Moran is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

---

* Honorable Will L. Garwood, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Feb. 5, 2002]

No. 99-12058-GG

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

versus

MICHAEL ABBELL, WILLIAM MORAN,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ____ F.2d ____).

Before: EDMONDSON, FAY and GARWOOD*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

---

* Honorable Will L. Garwood, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

93-470-CR-HOEVELER

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL ABBELL AND WILLIAM MORAN,
Defendants.

Miami, Florida July 9-16, 1998

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE WILLIAM M. HOEVELER,
SENIOR UNITED STATES DISTRICT JUDGE
AND A JURY

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* * * *

[8526] THE COURT: Now, you are probably not going to be able to hear everybody, but I will try to repeat what is said. We have everybody here.

Let me read to you a note that we got this morning.

It says, "Your Honor, this is to inform you that the jury is currently faced with a juror who has formed an unwavering opinion prior to, in spite of and irregardless of the evidence presented. The juror is unwilling or unable to review, read or view exhibits contrary to the juror's opinion. Could the Court please address this situation. Thank you."

Signed, and it looks like Robert Gooden, but we are not sure, and Debbie Sebastian, the foreperson has also signed it. It is undated, but we got it this morning.

* * * *

[8538] THE COURT: Let me say this: I hope you all can hear me. We have been at this for, excluding matters between trials and before trials, we have been at this for 8 months almost in trial.

I totally disagree with the concept that we are at a point where we ought to do nothing. So I am going to [8539] discard that, although I discard it respectfully, because I understand there is a basis for saying it, but I am going to do something.

I am not quite sure what it is. I don't know which way this person is bending; whether he is for acquittal or for conviction, or whether it is a she or who is for acquittal or conviction, but we know there is somebody in there who is unwilling to even think about the evidence, according to these people.

Now, here is what I propose to do: I am going to get Ms. Sebastian in here right now, and I am going to ask her to give us what facts she knows about this particular problem, and nothing else.

That's the way it is going to be. I don't want any further argument on the point, and that is what we are going to do.

MR. MOFFITT: I am going to ask for a mistrial.

THE COURT: There is an objection. There is a motion for a mistrial.

MR. ASBILL: I object.

THE COURT: The objection is overruled. The motion for mistrial is denied.

MR. MORAN: For the record, I am joining in the motions.

THE COURT: Mr. Moran joins in the motion, and [8540] that motion is denied.

MR. SREBNICK: Judge, can you outline what it is you are going to ask Ms. Sebastian?

THE COURT: Simply to explain this letter. Nothing more.

MR. PEARSON: Judge, I had given you a case citation. Apparently the Second Circuit has also spoken to it in U.S. versus Thomas, 116 F. 3d, 606 which cites the Eleventh Circuit case as well.

THE COURT: What does the Eleventh Circuit case say?

MR. RYAN: That is the Geffrard case.

THE COURT: Is that the case where we are had the religious problem?

THE COURT: Yes.

MR. SCOTT SREBNICK: I've read that case. That case is a situation in which the juror herself wrote the letter to the Court and advised the Court that in a 5 page letter that she was unwilling to deliberate.

THE COURT: Yes. It makes it a little different.

MR. SCOTT SREBNICK: Vastly different, in our opinion.

THE COURT: Would you bring her in.

MR. MOFFITT: Your Honor, we were just trying to find out what is happening.

[8541] THE COURT: We are bringing Ms. Sebastian in.

MR. PEARSON: Judge, in an abundance of caution, I would suggest that we focus on what occurred prior to their going into deliberations first and find out as she explains the

note, if that's the focus, because we don't want to know about the deliberation process, nor should we invade that process.

THE COURT: Yes.

MR. MORAN: I don't understand that.

THE COURT: Nor do I think we ought to have any identification as to which direction that particular juror is moving.

MR. MORAN: I didn't understand what he was proposing, Your Honor.

MR. PEARSON: Well, what I am proposing is this: If, in fact, there is a juror who reached an opinion beforehand, that's grounds for dismissal. You don't need to get into anything else. And depending on their conduct, it may be grounds for immediate dismissal.

MR. MORAN: Before hand?

MR. PEARSON: Before they got the case submitted to them. That's in violation of the Court's order. That's grounds for dismissal. If, in fact, there is a problem during the deliberations process in which someone has said, "I am not looking at the evidence, I refuse to deliberate," [8542] I think that is the second issue we should address, depending on how the first issue is addressed by the forewoman or foreperson. Then we should take it from there.

* * * *

[8542]

(Whereupon juror Sebastian entered chambers)

JUROR SEBASTIAN: Sure.

EXAMINATION BY THE COURT:

Q. I hope you all are well this morning.
A. Yes.

Q. Good. This is an unusual procedure that we are going [8543] through. So let me tell you what I don't want you to tell us.

A. Okay.

Q. I don't want you to tell us your count. I don't want you to tell us which way the jury is moving for or against. I have the letter.

Is this Mr. Gooden who wrote the letter?

A. Yes, it is.

Q. All right. And you signed it. And you are the foreperson, so I want to ask you a few questions, but I don't want you to tell us anything other than the answer, the specific answer to the questions that I ask you. All right?

A. Okay.

Q. Because we are not entitled to know what you are doing.

A. Okay.

Q. We are entitled to know if there is something illegal going on. If there is something that is not in accordance with the Court's instructions, we are entitled to know that, but we are not entitled to know anything about your opinions or what you are doing.

A. Okay.

Q. All right?

A. Yes, sir.

Q. Now, I have the letter. I am going to read it back to [8544] you. It says, "Your Honor, this is to inform you that the jury is currently faced with a juror who has formed an unwavering opinion"—I want you to listen carefully to these words—"prior to, in spite of and irregardless of the evidence presented.

The juror is willing or unable to review, read or view exhibits contrary to the juror's opinion. Could the Court please address this situation." And that's why we have you here.

MR. RYAN: Your Honor, Excuse me. There was one word misspoken. It is the middle sentence. The juror is unwilling. I think you pronounced it as "willing."

THE COURT: Oh. "Unwilling, yes, or unable to review, read or view exhibits, contrary to the juror's opinion."

First, do you have any facts that support the statement of Mr. Gooden that the juror formed an unwavering opinion prior to the evidence in this case?

A. Do you mean prior to the day we started hearing testimony.

Q. Yes.

A. No, sir.

MR. MOFFITT: I can't hear.

THE COURT: Did you hear my question?

MR. MOFFITT: I believe I heard your question.

[8545] THE COURT: This is Mr. Asbill and Mr. Moffitt. The juror waived [sic] to you.

MR. MOFFITT: Okay.

MR. ASBILL: We wave back.

THE COURT: No. She said not prior to the case.

MR. PEARSON: Not prior to the start of testimony.

JUROR SEBASTION: Well, the start of testimony.

BY THE COURT:

Q. Now, what does that mean? What do the words, "Prior to, an unwavering prior to the evidence and irregardless of the evidence presented," what does that mean.

A. I can only assume that what he is talking about is a statement that was made right at the beginning of deliberations.

Q. By this particular juror?

A. Yes, sir, and it has been reiterated several times since then.

Q. Has the juror deliberated at all?

A. No, sir.

Q. On any count?

A. No, sir, and this morning, I don't know if I should say this—

Q. Does it have to do with this letter?

A. It falls right into that letter, yes, sir.

[8546] Q. Something the juror said?

A. Yes, sir.

Q. About consideration of the evidence?

A. Of the law.

Q. Of the law?

A. In the instructions.

Q. What was said?

A. That "It is a stupid law, and we don't have to regard it."

THE COURT: Did you hear that, gentlemen?

MR. MOFFITT: No, sir.

MR. ASBILL: No, sir.

THE COURT: This morning the same juror said regarding the law that, "It is a stupid law, and we don't have to regard it."

MR. ASBILL: Was that with reference to any particular law, Judge?

BY THE COURT:

Q. What law was the juror referring to? Do you know?

A. Let me think. There are so many.

MR. PEARSON: Judge, I am not sure that matters. I don't mean to interrupt, but I am not sure that matters. I don't think we should get into that, Judge.

THE COURT: The question was asked.

MR. PEARSON: I don't think we should get any [8547] deeper into this issue.

THE COURT: Well, there are a number of laws referred to in the instructions.

MR. MORAN: Yes.

JUROR SEBASTIAN: Count I.

THE COURT: Count I. The RICO?

JUROR SEBASTIAN: Yes, sir.

BY THE COURT:

Q. Are you sure that's what is he was talking about, or she, or whoever it was.

A. I am positive.

Q. The note says, "The juror is unwilling or unable to review, read or view exhibits contrary to the juror's opinion."

A. Yes. That statement was made by the juror herself.

Q. Will that juror view any of the evidence or talk about any of the evidence.

A. No, sir. I mean, I am trying to think of examples where there might have been some—you know, some exchanges of information that wasn't already set in mind, and I cannot consciously think of anything.

Q. How about on the other counts, has the juror taken the same position?

A. Yes, sir.

Q. On all counts?

[8548] A. Straight across the board. It was said yesterday that, just straight across.

MR. MORAN: Could we inquire, Judge, what has been going on then for four days, if somebody has not been deliberating?

MR. PEARSON: I oppose that.

MR. RYAN: No, Judge.

MR. MORAN: I don't mean it in that sense. I am just saying it sounds—All right. I withdraw the question.

BY THE COURT:

Q. Has this juror at any time, since entering the jury room, engaged in meaningful deliberations?

A. Not in my opinion.

Q. Now, Mr. Gooden wrote this note. I realize this is a difficult question, but do any of the other jurors share this opinion?

A. Mr. Gooden showed me the note. I don't know if he shared it with anybody else. I didn't feel it was my place to say whether or not it could be submitted. I just understood that everything had to be signed by me.

Q. You understood correctly.

A. But as far as whether or not the other jurors feel that way, I am not sure. I know there is a lot of body language going on.

[8549] THE COURT: Yes, yes.

MR. RYAN: Judge, can I interrupt? We started with a question of a statement that was made indicating an opinion formed prior to deliberations, and then we moved off. I think that's relevant to the inquiry.

Ms. Sebastian indicated there was a statement made early on. It has been reiterated several times.

BY THE COURT:

Q. Did this juror state whether or not the opinion had been formed before you started deliberating or after you started deliberating?

A. Does the minute you walk out of the box mean anything?

Q. Yes.

A. Then, yes, sir.

Q. When you say, "The minute you walked out of the box, what does that mean? When you got into the jury room?

A. I am quoting. I am sorry.

Q. Go ahead and quote.

A. "The minute I walked out of the box."

Q. Without any deliberations?

A. Yes, sir.

Q. Or with deliberations?

A. Well, that was just the way it was said, and it wasn't said the minute we sat down. It was said later on in the course of the day, but that statement was made.

[8550] Q. What was the statement?

A. That "I made up my mind the minute I walked out of the box," which that's when the concern for me became that there was going to be no discussion. It was already made up, and it is concerning.

THE COURT: All right. I will not ask any other questions, but I would be glad to hear from any of you.

MR. RYAN: Judge, I think the proper course is to excuse Ms. Sebastian with our thanks, and then we can further discuss it with the Court.

THE COURT: You have nothing further to take up?

MR. RYAN: I am sure there is a lot to take up.

THE COURT: I mean with Ms. Sebastian.

MR. RYAN: I think Ms. Sebastian should be excused.

THE COURT: May I ask you, Ms. Sebastian, not to repeat to the jurors anything that took place in here?

JUROR SEBASTIAN: Yes, sir.

THE COURT: All right. Howard, you had something?

MR. SREBNICK: Yes, Your Honor. Can we request that perhaps Ms. Sebastian can wait in the lobby while we discuss this before she returns to the jury room?

THE COURT: Sure. Would you mind doing that?

JUROR SEBASTIAN: Not a bit.

* * * *

[8611] [The jury returns to the courtroom at 2:05 P.M.]

THE COURT: Sit down, please, folks.

MR. MOFFITT: Your Honor, I don't mean to intrude. I am trying to get Mr. Asbill on the line. He is waiting. I need to get off the line for a second to get him on.

THE COURT: All right. As you folks can hear, Mr. Moffitt is on the line with us from Washington.

Mr. Howard Srebnick is here. He is local counsel for Mr. Abbell, and he is standing in for Mr. Moffitt who will be on the phone shortly.

MR. MOFFITT: All right. Thank you, Your Honor. Hold on a second.

THE COURT: All right.

[8612] MR. MOFFITT: We are all here, Your Honor.

THE COURT: Is everybody ready?

MR. MOFFITT: Yes.

THE COURT: All right. First, I hope everybody is well today. I have a few comments I would like to make to you. Can you hear me all right?

I want to give you some instructions occasioned by a note that I received and I am not asking for any identifications. I am not going to go into the content of the note.

It did raise some issues that I find disquieting and that I think you need to know about. And so to keep it as brief as possible, but I want to be as pointed as possible, I want to read you some instructions that I gave you both at the beginning of the case and at the end of the case.

You, as jurors, are judges of the facts, but in determining what actually happened in this case, that is, in reaching your decision as to the facts, it is your sworn duty to follow the law that I am now in the process of defining for you, and you must follow all of my instructions as a whole.

You have no right to disregard or give special attention to any one instruction or to question the wisdom or correctness of any rule I may state to you. That is, [8613] you must not substitute or follow your own notion or opinion as to what the law is or ought to be.

It is your duty to apply the law as I give it to you, regardless of the consequences. By the same token, it is also your duty to base your verdict solely upon the testimony and the evidence in the case, without fear, prejudice or sympathy.

That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have a right to expect nothing less.

The evidence should be considered and viewed by the jurors in the light of your own observations and experiences.

Another instruction that is pertinent to what we are talking about is now I have said you must consider all of the evidence. That doesn't mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or believability of each witness and the weight to be given to his or her testimony.

Then I discuss how you should consider the testimony of witnesses; considering the relationship to the government or the defendant; the interest of the witness in the outcome of the case; the witness' manner of testifying, the witness' opportunity to observe or acquire knowledge [8614] concerning the facts about which he or she testified; the witness' candor fairness and intelligence; the witness' bias,

prejudice or hostility, and the extent to which the witness has been supported or contradicted by other credible evidence.

You may, in short, accept or reject the testimony of any witnesses, in whole or in part; and, of course, that goes for exhibits as well.

Now, somewhere along the line in recent history, the concept of jury nullification has crept into our law, and that is a myth. While it happens, it is not legal.

The jurors may not substitute your own notion of what the law is or should be, or whether it is right or wrong. I have given it to you. That's the law that is applicable to this case. That's the law you must follow, and you may not disregard it. It is just as simple as that.

Let me read to you from a case, a reasonably recent case that I think is pertinent.

A jury has no more right to find a guilty defendant not guilty than to find a not guilty defendant guilty. There is no right to misapply the law. Such verdicts are lawless.

It has been referred to, some jurors feel they have what is called the de facto power to interpret the law [8615] as they see fit. The same court says this:

Indeed, as we have noted above, the exercise of this de facto power is a violation of a juror's sworn duty to apply the law as interpreted by the court.

You would violate your oath, the oath that each of you took at the beginning of this case; you would violate your oath and the law if you willfully brought in a verdict contrary to the law given you in this case.

Now, the last instruction that I want to read to you that I have already given you is this:

Now, in arriving at your verdict, each of you must make up your own mind after consideration of all of the evidence as it is recalled by each of you. That consideration should include the opinions of your fellow jurors, as well as your own.

It is the essence of the jury system that you will listen to the views of one another, and that you will do so with open minds, and with a disposition to accept the views of the others, if the reasons advanced are persuasive, based on the evidence and not contrary to the Court's instruction on the law.

Any juror who, after such consideration of all of the evidence, comes to a firm conclusion different from the others, should not change that conclusion merely for the sake of conformity or unanimity.

[8616] You should, however, listen to and consider, with all the views of your fellow jurors, so that, if possible, you may arrive at a unanimous verdict.

In this court, in order to render a verdict in any case, all of the jurors must concur. That means that each and everyone of you must agree, must concur in the verdict that you return in this case.

Now, folks, that probably does not need to be said anymore than I have just said it, and that is that each of you must follow the law. You have no right to disregard it or suggest that it doesn't apply if, in fact, it does.

I have told you what the law is that applies to this case, and you should consider all of the evidence in the case. All of it. I am addressing this, of course, to all of you, as I am sure you all understand.

It would be wrong and against the law not to do that. You have all taken the oath that you would. And so I understand now and anticipate that each of you will, but I leave you with this last thought:

I was going to ask each of you individually the question of whether or not you will. You have taken an oath, and in that oath you have said that you will, but I am going to say this to you:

If there is anyone among you who is unwilling or [8617] unable to do that, I want you to tell me. You don't have to tell me now.

I want you to pass a note to the marshal and the note will get to me and say, "I simply cannot do that," for whatever reason. There will be no recrimination. There will be no action taken. There will be no penalty of any kind.

I will simply say "goodbye," but I want this jury to render a truthful and complete and honest verdict, and I want you to consider it carefully what I have said.

If anyone cannot follow that instruction, you pass a note to the marshal and he will pass it to me, and I will take care of it, and no one will say anything about it.

Thank you. You may retire to consider your verdict.

THE COURT SECURITY OFFICER: All rise.

[The jury leaves the courtroom].

* * * *

[8625] THE COURT: All right. We are gathered now. Let me say, for the record, this morning upon arrival in the office a few minutes before 9:00, I was handed this note.

I quote. "7-13-98. We are hopelessly deadlocked. We cannot reach a verdict."

That's printed, and then it is signed by Debbie Sebastian, foreperson, and again by Olga Alfonso. Interestingly, the pen of Debbie Sebastian is different from the pen of Olga Alfonso, which appears to be somewhat like the pen in color, at least, that wrote the verdict. Wrote the note above. One is in printing, the other is in script, but, nonetheless, the pen seems to be the same.

Debbie Sebastian, foreperson, has signed it, I guess in her capacity as foreperson.

* * * *

[8632] THE COURT: I investigated the problem. I elected against removing a juror because I thought that was premature.

I elected against examining each juror because I thought that might have been coercive and not in accordance with what the Eleventh Circuit would have wanted.

Now we have to re-evaluate the situation. We have got several options. So before you respond further, let me tell you what I think the options are.

One, of course, before I would grant a mistrial, is to do an Allen charge. I haven't done that yet.

Another is to examine carefully what may simply be a projection of what has already been stated was the problem; a woman who, for whatever reasons, is refusing to deliberate and may be totally contemptuous of the law, and who apparently is persisting in that view.

Whether it is for acquittal or conviction, we know not. It could be that there are 11 in there that want [8633] to acquit. It could be there are 11 who want to convict. We don't know the answer to that.

As I pointed out last week, we are now in the 8th month of trials on this case, not to mention the years we have spent in preparing. It has been a disaster I am sure for the defendants, as well as an enormous expense for the government.

I guess that's my way of saying I am not going to let this case go down easily.

* * * *

[8640] THE COURT: The latest communique. 7-13-98. The record should show that I interrupted myself to ask the press to leave the room, at which point I was handed a new note dated 7-13-98.

[8641] "Your Honor"—and I am quoting—"It has come to light that a note was written saying we are "deadlocked." It is the consensus of the rest of the jurors that we are opposed to this statement.

Thank you."] Debbie Sebastian, foreperson, signed by Ginnet Cortes, number 9, G. Russo number 5, J. Butler, number 11, Ann Doll, number 1, Robert Gooden, number 2, Ed McSwiggan, number 6, L.P., number 7. I cannot make out the name—oh, Ms. Grant, number 3, and Jacqueline Mandell, number 4. That's 1, 2, 3, 4, 5, 6, 7, 8, 9, including the foreperson, that is 10 who say we are not deadlocked.

* * * *

[8701] (Jury foreperson Deborah Sebastian present).

THE COURT: Sit down please. I have just a few questions I would like to ask you.

EXAMINATION BY THE COURT:

A. Okay.

Q. I will start by saying we appreciate the work of all 12 of you. I know it has been difficult.

I don't want you to tell us anything about your deliberations. I don't want you to tell us where you are in terms of numbers. I don't want you to identify any jurors at the moment.

I want you to carefully answer only the questions that I ask you because we are not permitted to invade your deliberations. We are permitted to know if any outside influences have been brought to bear on any of the jurors.

Do you know what I mean by outside influences, somebody bringing a paper in, somebody getting information from a witness, an accountant, or anybody bringing information into the courtroom or into the jury room that was not acquired

during the course of the trial. That we are entitled to know about, but nothing else. Not about your deliberations.

Now, the questions I want to ask you are the following: Since my instruction to you on Thursday [8702] afternoon, have there been any deliberations?

A. Yes, sir.

Q. Has everybody deliberated?

A. No, sir.

MR. MOFFITT: I did not hear the answer.

A. No, sir.

THE COURT: No.

Q. Is the person who is not deliberating the same one referred to by Mr. Gooden?

A. Yes, sir.

Q. Now, we got a note from a person this morning that was unsigned, and then the ladies out front asked the bailiff, Mr. Lee, to take it back in and see that it was signed before we could accept it.

Did you know about this note before it left the jury room?

A. No, sir.

Q. When did you find out about this note?

A. After—I didn't read it when I signed it, either, because I didn't feel like I had permission to do so, so I just put my hand over it and signed it and then requested the person who sent the note sign it, and it wasn't until a little while after that that I became aware of the contents of the letter.

Q. Were all of the jurors present when this note was sent [8703] out, if you know?

A. This morning?

Q. Yes.

A. I don't know. I only know I was not aware of it, its original being carried out to you. I don't know if any of the other jurors knew it or not.

Q. Then we got another note that says, and I will read it, and this is signed by you, "It has come to light that a note was written saying we are "deadlocked". It is the consensus of the rest of the jurors that we are opposed to this statement."

Without going into any detail about the deliberations, what does that mean?

A. That means that that's about the time when the note became known to the rest of the jurors that it had been sent, and there was a great deal of concern on the rest of the jurors' part that they did not want to be included in that deadlock.

Q. I see. Has the person referred to by Mr. Gooden engaged in any of the deliberations that have taken place since Thursday afternoon?

A. Can you be more specific?

Q. Considered evidence; talked about evidence; just deliberated?

A. No, sir.

[8704] Q. Has there been any indication at any time, either before or since the last time we talked to you, that any evidence has been brought in to or discussed in the jury room that was not developed for trial?

A. Not to my knowledge.

THE COURT: All right. Gentlemen and lady, that's all I have.

MR. RYAN: Judge, I think there was one you identified before that you didn't ask.

MR. ASBILL: I can't hear Mr. Ryan.

MR. RYAN: You had identified you were going to ask about whether there was any further comment about

following the Court's instructions. Did I miss that? I may have been wrong.

MR. PEARSON: I think it was covered in the context of your question, Judge.

MR. RYAN: Okay.

THE COURT: I hesitate to go into comments made by jurors—

MR. RYAN: I understand, Judge.

THE COURT:—at this point unless you all wish me to.

MR. PEARSON: No, sir.

MR. MOFFITT: Your Honor, I am concerned whether there were any indications—I mean the issue, I guess, is [8705] that whether any people were not going to follow the Court's instructions.

MR. RYAN: Judge, maybe we should just talk amongst ourselves.

THE COURT: Yes. I had not asked that question. I will, if you wish me to.

MR. MOFFITT: I guess so, Your Honor. I do wish to.

BY THE COURT:

Q. All right. Has there been any indication from any members of the jury, and particularly the one in question?

MR. MOFFITT: Since the instruction, Your Honor.

Q. Since the instruction that they would not follow the law?

A. No, sir.

THE COURT: All right.

MR. ASBILL: I did not hear the answer.

THE COURT: No.

JUROR SEBASTIAN: Not directly.

THE COURT: Not directly.

MR. PEARSON: Does that mean not verbally, Judge?

THE COURT: That kind of begs the question.

JUROR SEBASTIAN: I am sorry, but I wouldn't be being honest if I left it at that.

BY THE COURT:

[8706] Q. Do you have any further explanation?

A. Just that it was stated again today that we are not going anywhere with this. That's basically the verbal of it.

THE COURT: I think we have covered it as well as we can. I am going to ask you, Ms. Sebastian, not to mention any of my questions or anything we have talked about in here to the other jurors. You are the foreperson.

We deal with the jury through you, but as far as our conversation in here is concerned, that is going to remain here.

I am going to ask you to continue your deliberations, and you are now excused. Thank you, ma'am.

JUROR SEBASTIAN: Thank you.

(Juror excused).

* * * *

[8745] (Whereupon the following excerpt took place in chambers with Juror Gooden present)

THE COURT: Come in, Mr. Gooden.

[8746] JUROR GOODEN: Can I change my mind?

THE COURT: Sit down, please.

JUROR GOODEN: Thank you, sir.

THE COURT: How is your leg doing?

JUROR GOODEN: Good. Actually, I just found out my appointment is tomorrow afternoon at 2:30.

MR. MOFFITT: Your Honor, I cannot hear.

THE COURT: Talk a little bit louder.

JUROR GOODEN: I am sorry, Mr. Moffitt. It is in reference to my cast. I have an appointment tomorrow at 2:30.

THE COURT: 2:30. Not 3:30?

JUROR GOODEN: Yes, sir. At 2:30, to hopefully remove it.

THE COURT: Oh, good. Good for you.

JUROR GOODEN: I didn't get a chance to write you a note yet.

THE COURT: Well, you have now told us. I have your note that you sent to us yesterday—Thursday.

MR. PEARSON: Thursday, Judge.

THE COURT: Thursday. I will read it to you. It says, "Your Honor, this is to inform you that the jury is currently faced with a juror who has formed an unwavering opinion—prior to; in spite of and irregardless of the evidence presented.

[8747] The juror is unwilling or unable to review, read or view exhibits contrary to the jurors' opinion. Could the Court please address this situation. Thank you," and you signed it, and Ms. Sebastian signed it.

JUROR GOODEN: Yes, sir.

THE COURT: That is your note?

JUROR GOODEN: Yes, sir.

THE COURT: I want to ask you one or two questions about it, but one thing I want to make clear is I don't want you to tell us anything about the jury deliberations.

I don't want to you tell us what the numbers are; who is for this and who is for that. We are not entitled to know your thought processes; that is, the arguments that you have made back and forth, and things of that nature. Do you understand?

JUROR GOODEN: Yes, sir.

THE COURT: So listen carefully to my questions and answer only the questions that I ask you, like I tell the lawyers sometimes to do, and the witnesses, I should say.

You say here that, "We are currently faced with a juror who has formed an unwavering opinion prior to," and then going forward, "in spite of and irregardless of the evidence presented."

[8748] EXAMINATION BY THE COURT:

Q. What did you mean by "prior to?"

A. Prior to deliberations before anything was—I have to be careful how I phrase myself.

MR. MOFFITT: We cannot hear.

THE COURT: A little louder.

JUROR GOODEN: Prior to the jurors able to look at the exhibits, the indictment, the instructions, a comment was made regarding guilt or innocence prior to any deliberations whatsoever.

THE COURT: Yes.

EXAMINATION BY THE COURT:

Q. Did this particular juror at any time indicate to you that he or she had made up his or her mind prior to being picked on the jury?

A. No, sir, not to my knowledge.

Q. All right. So the "prior to" meant that the mind was made up prior to when?

A. Would you state that again? I am really nervous right now. I have never been surrounded like this before. I really have got the shakes right now.

Q. Just relax.

A. And I don't drink coffee.

Q. Just relax, Mr. Gooden. We know you are trying to do your best. We appreciate it very much.

[8749] She said she made the statement "Who has formed an unwavering opinion prior to—in spite of, and irregardless of the evidence presented.["] Just tell us what that means?

A. She had made up her mind.

Q. What does the prior to mean?

A. Prior to deliberations I guess would be a good way to phrase it, sir.

Q. Okay. Now, as far as she was concerned, what has been going on for the past four days? Has she been deliberating or not?

I realize that's an ambiguous question because the word deliberating is—

A. I think we have a language problem with the English language.

MR. MOFFITT: I can't hear this, Your Honor.

JUROR GOODEN: Should I just pick this up? Would it be better?

THE COURT: Yes. You can pick it up.

JUROR GOODEN: I think we have a language barrier. The instructions, the words are not simple enough. The instructions are referred to as a "guide" and not the law.

EXAMINATION BY THE COURT:

Q. Is this a quote from the particular juror?

A. Yes, sir.

[8750] Q. When was that statement made?

A. Thursday of last week or Wednesday. I am not sure.

Q. After I gave my instructions to the jury?

A. It was prior to that. It mean the re-instruction.

Q. Yes, the re-instruction.

A. Yes, sir.

Q. After I gave that re-instruction, was there any further comment from the juror about the law? I am not interested in any other comments. Just about the law.

A. That the juror was having a hard time understanding it.

Q. Okay. The note that came out this morning from the juror, a juror about the jury being hung, did you know about that before the note was sent?

A. No, sir.

Q. Now, I have a note from the jury which I got about 10:10 this morning. It says, "It has come to light that a note was written saying we are "dead locked". It is the consensus of the rest of the jurors that we are opposed to this statement.["] From your standpoint—

MR. MOFFITT: Your Honor, for the record, we are going farther than you said we were going.

THE COURT: Yes, but this note I think is fair ground because this goes to a question that we are ultimately going to have to ask the jury, in any event, at some point.

[8751] MR. MOFFITT: All right. Just for the purposes of the record, Your Honor, note my objection.

THE COURT: Your objection is noted.

EXAMINATION BY THE COURT:

Q. Does this mean that you oppose the statement of the juror who sent the note, or that you think you are not really dead locked?

A. No, sir. We oppose the statement from the juror's note.

THE COURT: All right. That's all I have, gentlemen and lady. Thank you very much, Mr. Gooden.

JUROR GOODEN: Thank you, sir.

MR. PEARSON: Judge, before you let him go, the issue of statements made prior to deliberations, I don't think you focused on that; what was, in fact, said if something was said.

MR. MORAN: I think that was covered quite clearly.

MR. MOFFITT: I can't hear this. I did not hear the comment.

MR. PEARSON: We just want to know the specific words.

THE COURT: The question that Mr. Pearson was suggesting is whether or not there were any statements made about opinions, I suppose, before the jury went out to [8752] deliberate by this particular juror.

In other words, was the case discussed at all by this particular juror before the deliberations?

JUROR GOODEN: No, sir.

THE COURT: I think that's all we need. Thank you very much.

JUROR GOODEN: I wanted to see your office, but not this way.

THE COURT: I will tell you what: When the case is over, you can come in and I will show you the entire office. Thank you very much.

JUROR GOODEN: Thank you.

(Juror Gooden was excused.)

THE COURT: Do you all want to go at 4:00, do you?

JUROR GOODEN: Yes, sir.

THE COURT: Mr. Gooden, please don't discuss with the other jurors what we have talked about in here. All right?

JUROR GOODEN: Yes, sir. No problem.

THE COURT: Thank you.

(Juror Gooden was excused)

THE COURT: Well, that answers the question we had, and that is that he had no prior information prior to the deliberative process.

* * * *

[8802] (Jury forelady present)

THE COURT: Well, good morning. Welcome back.

JUROR SEBASTIAN: Thank you.

THE COURT: I wanted to ask you, because we want to eventually answer the questions that have been presented, and actually they were not questions, but they do require a response by the two messages we got yesterday.

However, once again, I don't want you to tell us about anything except the specific answers to the questions that I ask.

JUROR SEBASTIAN: Yes, sir.

EXAMINATION BY THE COURT:

Q. Have there been any deliberations this morning? Just yes or no.

[8803] A. Yes, sir.

Q. Has everyone engaged in those deliberations?

A. No, sir.

Q. I see. After my instruction of Thursday afternoon, were there any further deliberations by all jurors?

A. Yes, sir.

Q. Including the juror who you mentioned to us in the first instance on Thursday afternoon?

A. No, sir.

Q. All right. Well, let me put it perhaps more succinctly this way: Since I instructed the jury on the need to follow the law as it was presented in the instructions on Thursday afternoon, has the juror referred to in Mr. Gooden's note and during our discussion the other day engaged in any deliberations up to and including this moment?

A. No, sir.

Q. I don't want you to tell us anything that that juror has said or done other, than the answer to this question: Don't say anything about statements, but what is the juror doing?

A. Right now, her nails.

Q. And over the past 4 days or 5 days, what has this juror been doing?

A. Sitting.

THE COURT: Does anybody have another question [8804] you would like me to ask? You can write it down if you wish.

MR. MOFFITT: Yes, sir.

THE COURT: I might also ask this question while Mr. Moffitt is writing.

Q. Is this true of all counts?

A. Oh, yes, sir. The statements that have been said have been blanket statements.

Q. Blanket statements.

A. Yes, sir.

MR. MOFFITT: Your Honor, could you, please, ask the juror to step out so we could talk freely for a second?

THE COURT: Would you mind waiting?

JUROR SEBASTIAN: I wouldn't mind a bit.

THE COURT: For just a moment, please. Thank you.

(Juror excused.)

* * * *

[8809] THE COURT: Bring her back in.

(Juror present[])

THE COURT: Just one last question.

JUROR SEBASTIAN: Certainly.

Q. When you referred to her making blanket statements, what were you referring to?

A. I was referring to that—

Q. The same statements you made the other day?

A. Yes, sir.

Q. About?

A. The decision having been made, and that's the end of it.

THE COURT: Okay. Thank you, ma'am.

JUROR SEBASTIAN: Okay.

(Juror excused)

* * * *

[8812] THE COURT: Come in, Mr. McSwiggan.

A. Thank you, sir.

Q. How are you this morning?

A. Good.

Q. I just wanted to ask you one or two questions, and please don't be intimidated by all this legal power around here. I am sure you won't be.

I want to tell you first that I am not going to ask you anything about what you are doing in there about who is saying what to whom or who is deciding this way or that way, or anything like that.

I want to you listen to my questions carefully, as I am sure you will, and just answer that directly without adding anything to it.

It has come to our attention that one of the [8813] jurors is simply refusing to deliberate. Is that accurate?

A. Yes.

Q. Has that been the case at some time recently, or has that been the case since you went in to start deliberating?

A. Since we went in starting to deliberate.

Q. Okay. Since my instructions to you all the other day Thursday on following the law, has that person attempted to deliberate at all?

A. Somewhat.

Q. You shake your hand.

A. Well, I mean, attempted to deliberate at all, I would say, yes.

Q. How about this morning?

A. No.

Q. Some mention was made by two jurors whom I have talked to. The statements were slightly different, but essentially in the same direction, that this juror has made statements about not following the law. Have you heard any such statement?

A. Yes, I have.

Q. Tell us what you heard only in that regard.

MR. MOFFITT: Can we have a time, Your Honor, with respect to this?

THE COURT: Yes. Give us an idea.

Q. Was this early or later, or what?

[8814] A. No. This was last week.

Q. Yes. What did the juror say?

A. The juror said that she doesn't care what the law is. She is going to follow her feelings, and that's sort of like a paraphrase along those lines. She didn't care.

Q. What the law is?

A. Uh-huh.

MR. MOFFITT: Was this before or after?

Q. Was this before or after my instruction on Thursday?

A. Before.

Q. After my instruction on Thursday, did this particular juror say anything about her willingness to follow the law one way or the other?

A. No. She didn't say anything.

Q. Would it be fair for me to conclude that—and I want you to correct me if I am wrong—that this lady has not deliberated at all since you went in there? When I say deliberated, I mean engaged in a meaningful discussion about the evidence and the law and who is right and who is wrong.

A. In my opinion?

Q. Yes.

A. Yes. It would be fair to say that.

Q. And your reference to some deliberations after my instructions, you don't have to tell us what she said, but what did that amount to in terms of time, for example?

[8815] A. Very little. She just didn't really had her back up and really didn't want to participate too much after you had talked to us.

Q. You say she had her back up. Was she angry?

A. Yes. I mean, she just didn't want to participate that much.

THE COURT: Yes. Okay. I have nothing else. Gentlemen, lady?

MR. RYAN: No, sir.

MR. PEARSON: No, sir.

THE COURT: Thank you. Mr. McSwiggan, please don't discuss what you and I have discussed with any of the other jurors, and please keep trying.

A. Okay.

THE COURT: Thank you.

A. Okay.

(Juror excused)

* * * *

[8818] THE COURT: Of course. Let me say this again so there will be no misgivings about it. The defense and the government, if I can be so gratuitous, objects to the entire process that I am going through.

And so if whoever has an opportunity to present this, if necessary, at some later point to the Court of Appeals, will have their objection on the record.

* * * *

[8819] (Juror Blanton Present)

THE COURT: Come in, sir. Have a seat.

A. Okay.

Q. Mr. Blanton, I am going to ask you just a few questions. I do not want you to tell us anything about what you are doing in there or who is for what.

A. Okay.

Q. We have had some matters come to our attention that indicate we ought to do just a slight investigation of the process, and I want you to be careful just to answer only the questions that I ask you and not tell us about anything else.

A. All right. I will try.

Q. We are not clearly entitled to know very much about what is happening.

[8820] Have all of the jurors been deliberating since you went into the jury room.

A. All except one.

Q. Okay. That is a female juror?

A. Yes.

Q. Has this juror made any statements about her view of the law and whether or not it applies in this case?

A. Yes, she has.

Q. What has she said?

A. She said that we didn't have to follow the instructions. Those were just—the instructions that you gave us that we can base our opinions on, our decision on our opinions basically is what she said regarding that.

MR. MOFFITT: Can we find out when that was?

Q. Do you recall, Mr. Blanton, when I gave an instruction about the law on Thursday?

A. Yes.

Q. Was this statement she made before or after my instruction?

A. Well, actually, she said it the first day that we started deliberating. She reiterated it several times, and then after your instruction. Did she say it again after? I can't say for sure that she said it after.

Q. You said she said it several times. Did she repeat the same statement or change it at all.

[8821] A. Well, she might have changed her basic wording here and there, but basically she was saying the same thing that we didn't—that those weren't—you know, basically if you are saying that that wasn't everything, and she had her own view of reality, and that was everything.

Q. Okay. How many times did she say this, if you recall.

A. Well, I would say—in fact, one morning we let her speak for an hour and a half almost in which she gave us her whole version of reality, and that would be several days into it. So I would say at least three times that I heard her say it.

Q. She spoke for an hour?

A. Yes. We let her because she was so unwilling to participate in the process, and we were trying to get her to, you know. So she got up and started talking one morning, and we let her speak. It was over an hour.

Q. And what was the thrust of what she said?

A. She just told us her basic opinion about—what her opinion was how she felt.

Q. Don't tell us who she was for.

A. Right.

Q. I am only interested in her statements about the law.

A. That she didn't have to follow this. This is just what you said, and basically that was it. That was regarding this. That's basically the gist of what she said.

[8822] Q. Since I gave that instruction—I may have asked you this and you may have answered it, but let me repeat it.

Since I gave you the instruction on Thursday, has she deliberated at all?

A. Well, I would say that this is my opinion—

Q. Yes.

A. That she pretended to a few times.

THE COURT: Okay. That's all I have, lady and gentlemen.

MR. PEARSON: Nothing further, Judge.

MR. MOFFITT: Your Honor?

THE COURT: Yes.

MR. MOFFITT: Would you ask Mr. Blanton to step outside for a second?

THE COURT: Mr. Blanton, could you wait for just a moment, please?

A. Sure.

THE COURT: Thank you.

(Juror excused)

* * * *

[8825] (Juror Blanton present)

A. By the way, I apologize for my appearance. I am the [8826] one that lost my keys yesterday, so I had to take the bus all the way to homestead.

Q. Oh, my.

A. So I dressed down.

Q. Did you find your keys?

A. Yes, I did.

Q. Well, no, don't worry about that. As long as you are deliberating, you don't have a court appearance.

You mentioned the hour and a half, the hour to an hour and a half that she was explaining herself. During that hour and a half, other than her statements about the law, did she discuss the evidence in this case?

A. No, no. It was just her view of reality.

THE COURT: Okay. Thank you, sir. I appreciate it. Mr. Blanton, please don't discuss with the other jurors what we have discussed here.

A. Okay.

THE COURT: Thank you very much.

(Juror excused)

* * * *

[8828] (Juror Doll Present)

THE COURT: Good morning.

A. Good morning.

Q. Won't you sit down.

A. Thank you.

Q. Ms. Doll, I want to ask you just one or two questions about the process. You know all these folks, I am sure, but we have decided that while they do all the talking during the trial, I am going to do the talking this time, so I wanted to ask you just one or two things.

Please don't tell us what people are saying about who they are for or who they are against, or anything like that, and just be careful to answer only the questions that I ask you because we really cannot invade your province as jurors.

Has there been any meaningful deliberation by all of the jurors since you went into the jury room?

A. The word "all" gets me.

Q. Yes. Everyone.

A. Not all.

Q. All right. How many have not deliberated?

A. One in particular.

Q. Has that person deliberated with you all at any time?

A. Not meaningful deliberation, in my opinion.

[8829] Q. Has that person made any statements about the law and its applicability or inapplicability to what you are doing?

A. No. Just not followed it.

Q. Well, how do you know that?

A. From what she has said.

Q. What has she said?

A. Well, she will give reasons and will say, "You are not following the law."

Q. And she says.

A. "I don't have to follow those guidelines."

MR. MOFFITT: Your Honor, I think you should ask when this occurred.

Q. You remember when I gave an instruction on the need to follow the law.

A. Right.

Q. On Thursday.

A. It made no difference.

Q. How do you know that?

A. Because we would deliberate, and we could tell it didn't make any difference.

Q. Did she say anything after I gave that instruction? Did she say anything about her willingness to follow the law one way or the other after that?

A. Not in so many words, but she just disregarded it and just spoke personally a lot.

[8830] Q. When you say spoke personally, what do you mean?

A. "My opinion, and this is the way I think." Those kind of phrases that made me think that she did not listen or did not understand what you said because you did it very well a couple days ago when we were down.

Q. So the statements that you attributed to her about, whatever it was you said about not having to follow the law was before I gave that instruction?

A. Before and after.

Q. I see. Did she make statements after to the same effect?

A. Right. It didn't seem to sink in.

MR. MOFFITT: Your Honor, can you ask the juror did she make statements about the law after, or is that Mrs. Doll's opinion? That is what I want to know.

Q. Did she make any statements, Mrs. Doll, after the instruction about an unwillingness to follow the law?

A. No, but just her wording was no different than it had been before you gave us the little talk.

Q. Has she at any time been willing to discuss the evidence in the case?

A. Yes, she discusses it.

Q. I see. And to what extent?

A. She doesn't follow the rules that we are supposed to follow when she discusses it.

[8831] Q. Okay. Has there been any meaningful deliberation this morning with her included?

A. She has been there and she has not said anything this morning, but there has been a lot of very meaningful deliberation on everyone else's part.

Q. She has not participated?

A. No.

Q. Or has she participated?

A. She hasn't participated, but she is alert and looks around and listens.

THE COURT: Okay. I think that's all I have, folks.

MR. PEARSON: Yes, sir.

THE COURT: Is there anything else you want to take up with me before I ask Mrs. Doll to go back?

MR. RYAN: No, sir.

THE COURT: Thank you very much. Keep trying.

A. We will.

THE COURT: Please, Ms. Doll, don't discuss with the others what we have talked about. Thank you.

(Juror Doll excused)

* * * *

[8846] (Juror Alfonso present)

THE COURT: Sit down, please.

JUROR ALFONSO: Hi, everybody.

EXAMINATION BY THE COURT:

Q. How are you doing?

A. I am doing good.

Q. All right. Good. Good. I want to ask you one or two questions, and let me begin by saying—

A. That's not my telephone, right?

[8847] THE COURT: That's not your telephone.

MR. MOFFITT: That's not your telephone. It is Mr. Asbill.

THE COURT: Mr. Asbill is on the line with us. The purpose of my asking you these questions is not to invade your thinking anymore than I have to. It is not to make you change your mind about any ideas you may have.

Those ideas, whatever you think is right is the way you believe, and I don't want to invade your thinking at all, nor do I want you to feel that I am putting any pressure on you at all.

All I want from you are truthful answers, and I know you will give them to me. I am not interested in arguing or finding fault with anybody. I am simply trying to get some answers to some difficult questions that have been presented to me, and let me say to you that whatever your answers are, that's all right.

A. Okay.

Q. There will be no recrimination of any kind.

A. I understand.

Q. Do you understand that?

A. I understand that, Judge, yes.

Q. Good. Whatever your feeling about things may be, I want you to nurse that feeling, cherish that feeling without any effort on my part to change it.

[8848] However you feel about this case, I am not going to say a word that has anything to do with your changing your mind. I don't offer any opinions about what should happen in this case. I am only involved as the judge, and all I want is justice to be done in whichever direction that may be.

A. I am with you.

Q. Do you understand?

A. Exactly.

Q. We got a note from you on—

A. Yes.

Q. Yesterday, I guess.

A. It was yesterday morning, yes.

Q. Right. You sent that note in?

A. Yes, I did, Judge.

Q. Were you speaking for yourself or for the jury?

A. No. I was speaking according to what was there in black and white. The vote.

Q. Don't tell me what the vote was.

A. No. I am not going to tell you. According to the vote, okay, and the way that I felt, we are not going to go nowhere.

Q. Okay.

A. Okay. The way everybody feels, it is not like all they were here or we are here. We are maybe not exactly here, [8849] okay, but strong feelings on both sides.

Q. Yes.

A. So strong that I don't think we are going to come out with one verdict. So what I have been trying to explain is, like I say, we don't have—if we feel we are not going to get to no point this is hang.

We are deadlocked, so I wrote that note, and it is not my feelings because it is not 11 to 1, or whatever. That's the only thing I want to say, and I don't think I feel alone.

Q. All right. Now, I understand. Did the others know that you were sending the note out?

A. No, but I also want to say that, okay. The other note that was sent, that probably was about me, they didn't told me about that note, and I also, I don't know how much do you want me to say.

Q. Not much.

A. Not much. But I also got a lot of—if I cannot say—if I cannot say much, maybe I can say nothing.

Q. You got some criticism?

A. Yes, and also threats. Threats, if I don't vote this way. Like I say, I don't know how much I can say, okay. I am not going to say which way is my vote. Okay.

Q. No, no. We cannot know that.

A. Okay. If I don't vote this way—let me put it more [8850] specific. The press is going to be there. Okay. If you don't vote this way. Okay. You are talking to me like this, I am going to tell you that you are going to have to face the press and tell the press why you didn't vote it this way.

Also, I have problems. I've been accused that I don't want to follow the instructions.

Q. All right.

A. I've been accused of that. I have an explanation to that. I have told them this. This is not everything here. Okay. Also, like this is not everything here. We have to take into

consideration the testimony of the witness, this, this, this and that. Okay.

Like this is not everything. So I have been criticized because I don't want to like follow the instructions, and I feel also your instructions say very clearly that we have to use our common sense.

So like I am trying to explain how do I get common sense? Through experience in life. This is my way to explain common sense. How are you going to tell me that I don't understand this part, Judge? Use your common sense.

If you are going to think about experience in life, how can I use my common sense? We don't want to hear it.

Q. One of the jurors has suggested that you made a [8851] statement that, "I don't have to follow the law."

A. Okay.

Q. Did you say that?

A. Maybe not exactly. Okay. Like this is not the only thing that I have to follow. Like this is not everything. This is not everything that we have to take into consideration.

So they are telling me that, yes. So like I said, I have been having a lot of conflict, and also like on my second day, like I said, if you feel like you have been threatened, like I said, I don't care. I will talk to the press and also talking to me like this, okay, to me that's intimidation. Okay.

MR. MOFFITT: Can the record reflect.

A. Like this.

THE COURT: Shaking the hand.

A. And also if I don't agree, it is not because I don't agree. It is you don't understand. So it is not like I say, no, no, no. Say yes, yes, yes. I give my point of view, and I am not alone. Okay.

This is the way that I feel. Okay. And it is like I don't know. Somebody, they say, "She's not dumb. She understand."

The only thing is if I don't agree with you, you know, if I don't agree with you for whatever, okay. It is [8852] not like I say, no, yes. Okay. Let me be more specific.

Q. Let me tell you what the problem. Then you tell us whatever you want. It has been suggested that you made up your mind even before you went into the jury room.

A. Okay. No, Judge.

Q. Not so?

A. Not so before. No, Judge. Wait a minute. Wait a minute.

Q. People are suggesting that you are not deliberating.

A. Okay. The same way I can say because I can say the way that I vote—

Q. No, don't tell us what your vote is.

A. I voted one way from—as soon as I walk out of that room, I voted one way and I say because this and because of this and because of this. Okay.

I been reading like everybody else through the evidence. I've been giving my point of views; this, this; this, you know, things like you get. Okay. The same way that I voted this way. Okay. Some other people from moment one voted this way. They haven't changed.

Q. Using your other hand.

A. Using the other hand. They haven't changed a bit. Okay. But for them it is okay. Okay. You are with me. Okay. You don't have to explain yourself. Just say, "Yeah, yeah, yeah. You know, I agree with you," but in order for [8853] me, my vote to count, I have to give a heck of a fight, and not only me. Everybody who say the opposite to that person have to give a heck of a fight.

Q. Well have you been deliberating with them?

A. Oh, yes, yes.

Q. Have you been discussing the evidence?

A. Oh, yes, yes. Probably I have been the one arguing more than anybody else. Arguing. Discussing, giving my input.

Q. You see, what worried me about this was the statements made by several people that you had said you simply were not going to follow the law.

A. That's not exactly like they say. Maybe I have a problem with the federal law. Okay. Maybe I have problems due to the fact that I been so many years with the criminal law, and I say this doesn't make sense this, you know, but also on the other hand it is not only like you say.

We have to take into consideration so many other things. Not only if you tell me this is black—this is black and white, and if I say, "Wait a minute. Maybe this is black and white, but it got kind of mixed, now it is not black and white, it is kind of gray," do you know what I am saying?

That's my point. This is black and white, yes, but see this, you've got black here. You have got white [8854] here, but during the time this black and white is like a mix merging, and now it is not black and white. It is gray; a little gray. Do you know my point?

Q. Yes.

A. Okay. I don't remember if I should share something here that—I don't know if I should show you this, but it is the same way that I am talking about me. Let me say—

MR. MOFFITT: Your Honor, perhaps if there is something the juror wants to show you, it better be shown to you.

JUROR ALFONSO: To you.

MR. MOFFITT: Privately and not with the rest of us in the room.

JUROR ALFONSO: And I am going to take off the name, also, so you would not know where it is coming from.

MR. MOFFITT: But I think perhaps—

Q. No, I don't think it is something you are going to see, anyway. It is probably a paper of some kind.

A. Let me take off the name. Let me take off the name. Okay?

Q. Yes.

A. Because I feel that this specific person has like a hidden agenda. See the last line, the last very line, the last, there is something that he is missing there. It isn't necessary. He doesn't want the second part. He is pushing [8855] for the first part, okay, for the first one.

Q. Well this really doesn't say much.

A. It doesn't say much.

MR. MOFFITT: Your Honor, I am going to ask that that be marked as an exhibit.

THE COURT: Yes.

A. It doesn't say much, but you see the very last line?

Q. Yes.

A. There is room. There is supposed to be three things. Okay. And he is not—he doesn't necessarily want the second. He wants the first part.

Q. Well, I assume you have been sharing your differing views?

A. Oh, yes, yes.

Q. What I am mostly interested in is whether or not you have been willing to follow the instructions of the Court.

You see, I gave you a group of instructions as to the law that is applicable to this case.

Now, let me tell you one thing that was said about Count I. You said, "This is a stupid law. We don't have to follow it."

A. No, I never said it is a stupid law. I never used the word stupid, Judge, but let me say something to you, also. Okay?

Q. Yes.

[8856] A. Okay. This part of it over here, for example, I don't understand this part over here. So, according to them,

the first day they argue with me because I don't understand this part over here, and to me it is very clear. Without fear, prejudice or sympathy. Like I say, without fear means without fear of anybody. Okay. Anybody. That doesn't mean one side or the other.

Q. That's right.

A. Prejudice, it means everybody. It doesn't mean one side and another. And sympathy, it doesn't mean this side or another. So this is another problem that I had. Okay.

I couldn't understand this, so they have to comment on the side and explain to me. I say so I forget about that and I went back on the second day. This is when a specific person come to me and telling me, "No, no, no. Maybe you got a problem with the English language."

Okay. And I say, "This is so in black and white," and then I say, "I am having problems with the English language."

When I say this means fear, the judge is not telling us fear against here or here. It is fear in general. Fear to the press. That's another thing that I mentioned. Fear. So this is the kind of problems that I am having.

Q. Well, don't worry about the press. They are not [8857] involved.

A. Exactly. I don't worry. I don't worry.

Q. All I am interested in is determining the answer to this question.

A. Okay.

Q. There are four counts in this indictment. Each count concerns law as well as facts. The jury listens to the facts. They make up their minds as to who is telling the truth and who isn't, and then they apply the facts to the law.

Now, have you at any time told these other jurors that you don't have to follow the law?

A. Okay. That's not the only thing that I have to do. I didn't say—see, like, also, I told—that's not everything that I say.

Q. Did you tell them that?

A. No. Wait. That's part of what I say.

Q. Yes.

A. Okay. I don't have to follow only the law. I have to use my common sense. I have to use—I have to—the testimony, you know, while they were talking here. Also, I have to take into consideration this is not everything. This is not everything, like I said, because this is too narrow. It is like I don't know if I can explain it to myself.

[8858] Q. Well, I am not sure that I understand.

A. Let me say something: The law say—see, the thing I can't say everything because I can't say everything, so that's why it is so hard for me to explain myself. The law says this is this, but do you know what I mean? This is this, but if you feel that it is a doubt, any reasonable doubt, then—

Q. If you feel there is a reasonable doubt as to the facts, the evidence, then, of course, you must acquit, but you cannot change the law.

A. No. I understand that part.

Q. The law is the law, and it applies. You make the decisions as to the facts. If you feel that there is a reasonable doubt as to the facts, then you can acquit, but if you feel that the facts have been proved—

A. If I don't feel that way—

Q. Well, let me finish. If you feel the facts have been proved, then you cannot change the law. You cannot say, "I am going to disregard the law if they apply to the facts."

Now, if you have a doubt about the facts, that's something else. Do you understand?

A. Uh-huh. Okay. Let me ask you a question: For how long—okay. This is the way that I feel. You are going to think my way and I am going to keep banging into your head until you agree with me, that can be done? Like I have [8859] somebody that said, "Stop banging on her head. She told you and she gave you an explanation because she doesn't agree with you."

That happened. We are fighting, Judge. Soon you will hear a chair being thrown in that room. I hope not. So like I said, anybody has a right to criticize me.

Q. No, no.

A. Okay. To keep yelling at me.

Q. These things happen in jury deliberations, but they are not good.

A. Okay. To yell at me. They keep banging on my head until I agree with you because that is what you want?

Q. No. If you believe in your position, you should stick to your position.

A. Stick to my position.

Q. But you should consider the positions of other people as well.

A. Okay.

Q. See, one of the problems that we have understood is that you are not deliberating.

A. I don't know what to call it. Like I said, I understand. If I say, hey, what I've been doing all this time. I am not sitting here like this. I am sitting here.

MR. MOFFITT: Let the record show—

MR. RYAN: Judge, I think we can cover all of [8860] this later. Why don't we let the jury speak.

MR. MOFFITT: Excuse me. I want the record to reflect what she did.

THE COURT: She put her hands over her ears.

JUROR ALFONSO: Okay. Like I say, I understand if I would have come over here and I said, "I don't care what the judge say, this guy is blank." Okay.

I am going to come over here and I am going to go like this, and I am going to raise my hand. I understand. Okay. But if you tell me something, and I say, "Wait a minute, wait a minute, wait a minute, I don't agree with you because of this and because of that and because of this," and you keep

asking me about like, "Give me more," and I keep telling you, "I want to hear more," you know what else do you want me to tell you?

And let me tell you, Judge, and I wish that I can tell everything. I can't say everything, but I wish to tell everything. I am not the only one that have that problem.

Everybody that doesn't agree with his point of view has to go through that. So the way that I feel is some of the people there, they just agree with him because they don't want to argue the way that I have been arguing; the way that I have been expressing, and also I got a disadvantage. They can speak better than me. They can [8861] read better than me. Do you know what I am saying?

Q. All right.

A. Like I said, Judge, if you want to take me out of it, take me out because, like I say, maybe I follow it from the other courthouse. I even give the benefit of the doubt to myself and say, good, maybe it is because the federal law is so complicated, you know, when it comes to the other—you know, the criminal laws and this and that, but then things that I know not that well from the word, and then you will tell me, for example, Judge, can I give you an example without telling I work in the jail.

I know how things at the jail are. You can tell me about a hospital, but don't tell me the way at the things are in the jails. Maybe things happened this way because of this and because of that.

At least listen to me, and then you will tell me, no, that didn't happen that way. I am not saying I am right. I am not saying you are wrong, but at least give me the opportunity and the chance, at least, like I said.

Q. Well, I am going to let you go back in just a moment. I just want to ask thank you question again.

A. Ask me. I love to answer.

Q. Did you say to the other jurors that the law as to Count I was either stupid or silly and you didn't have to follow it?

[8862] A. No, no, no.

Q. You never said that?

A. No. Silly, stupid, I never have used that word; especially silly.

Q. What did you say?

A. I am having problem with—I even suggested. Okay. They didn't want to do that, either. I even suggested I am so stuck in this. The one that is hard for me to understand, the hardest one is number 1.

Q. Yes.

A. Because I feel like every day I am throwing more things in there. When you think you have it all, it is like write, write real quick. I am throwing things over there. Instead of that, I need time. There is a specific case. Okay.

I feel like it is a dope; the same repetitious. I feel there has been like a lot of repetitions. I cannot talk, Judge.

Q. Do you feel that you can ignore the law?

A. No, Judge, but let me put it this way: Let me put it in a suggestion that I have. Okay?

Q. Yes.

A. Number 1, this is the one that was more complicated.

Q. Oh, yes.

A. Oh, that was very, very complicated, and I see things that I am throwing there. I don't know where they are [8863] coming from. Okay.

So like I said, well, we don't go to—why don't we go to count number 2? We don't have to finish today with this count. If we are like deadlocked in here, okay, let's go to Count II. Let's go to Count II. Then we come back. Okay. We have sustained a vote. Do you know what I am saying? Sustained for now. I suggested can I sustain? Oh, what can I say.

Q. Have you—well, I should not ask.

A. It is crazy Judge. I am going nuts.

Q. Well, I understand. It is not easy.

A. I am not sleeping at night. Well, I am sleeping half the night.

Q. I understand.

A. It is crazy, Judge.

Q. Has there been no other count. Discussed only Count I?

A. Oh, no, no. That's another thing, Judge. It is like we already discussed everything.

Q. Everything?

A. We are going back again in circles.

Q. That is enough. That's enough. What is your concept of the word "reality?"

A. Reality. Reality can be confused. What is reality to you? That doesn't mean reality to me. So reality is in the eye of the beholder. Okay. And also it is intangible. It [8864] is an intangible. You can show me this is a chair.

I can accept this is a chair, but you cannot tell me there is a ghost. To you, if you saw the ghost, to you the ghost is real. You saw it. If I didn't see the ghost, it is a doubt. Is the ghost for real there?

Q. Does this idea apply to this case?

A. Reality?

Q. Yes.

A. In a way. Okay. Like I said, this is a very, very complicated case. There is a lot of things. We were not there, so we presume it happens because we were not there. Okay. We didn't. We were not there. We didn't see everything happen. We didn't see it happening.

So there is what you say. Did this happen for real? So you have to use your common sense. I don't know if I explain it to myself. Did this happen for real? You are telling me this.

Somebody else is telling me, no, but I am here to think according to what I have.

It happened for real because this is a lot of intangible things that we don't know. It is not here. I don't know if I can explain it to myself.

Q. Does that apply to this case?
A. Apply to this case?
Q. This idea of reality.
A. The idea of reality?
[8865] Q. Did you discuss reality?
A. No, we never discussed reality. No, no, no. That threw me by surprise, Judge.

THE COURT: All right. I don't think I have any other questions, folks.

A. Okay. One thing.
Q. Yes.
A. We don't have to change our vote to compromise the other side, right?
Q. You don't have to change anything as long as you believe in what you are doing and so long as you do it according to the law and the evidence.
A. And how many times do we have to go in circle?
Q. That's up to me.
A. Because like I said, Judge, when I send you that note, it is not like we argue. We had count number 1 and, no, no no. When I sent you that note, we have from A through Z already covered, but we have to go one more time and go one more time and one more time and one more time until we get so tired here and we cannot think anymore.
Q. I want to make sure you understand that the law must be followed. Do you understand that?
A. Yes. Judge, I feel that like I have been following the law. Okay. But I also in the same talking, I don't think that I feel I should change me to please the others or to [8866] be—

Q. No, no. You don't have to please anybody except yourself. That's who you have to please.

A. Yes.

Q. But in doing that, you cannot disregard the law. You see, one or two of the other jurors have suggested that you told them that the law is—

A. They used the word "silly."

Q. No, no. But one said that you said the law is just advisory. We don't have to follow it.

A. Okay.

Q. Did you say that?

A. Exactly like that, no, Judge. I say, "This is not everything." I think I went like this to the table. "You are telling me that, here you are telling me this and this and this and this is not everything. We have to take into consideration a lot of things here," and they jump on me, too.

Q. Well, let me put it this way: If you don't feel you have to follow the law, then you are not complying with the instructions.

If you follow the law and you say we don't have to do everything, and you don't have to do everything, what you have to do is, once you have made up your mind as to the facts, you know, did somebody do this or didn't they, that's [8867] what you decide.

A. To the facts, yes.

Q. Yes. If you decide they did do it, and the law says they shouldn't have, you cannot then disregard the law.

A. Judge this is—this was my first argument. Okay. "You are not listening."

I say, "This is what I have been doing all this time."

"You are not following the law."

"I am listening. I follow the law, but I can't agree with you, and that is what you want me to do. I am sorry. I can't agree with you. That is what the law is. You are telling me

that I cannot agree with you so I am not following the law because you are not listening. You are not listening."

Like I said, Judge, if you want to take me off, I am more than happy to leave.

Q. No.

A. It is a nightmare, Judge. It is a nightmare, Judge.

THE COURT: I just wanted the lawyers to hear what you had to say because the question has been raised, and I want you to understand that you are entitled to hold your opinions as you feel them.

If you feel they are correct, don't do anything that would compromise your feeling. We only want you to do [8868] what is right.

A. Judge, if I don't understand, one of the things that was known in there, like I feel it is repetitious, how can I do for somebody else outside to explain to me if this can be done or cannot be done, because I suggested why don't we go to the judge I suggest.

I am not going to vote because I don't understand this, and I don't think this should be here. This particular predicate. Okay. Why don't we go to the judge? Okay.

Oh, the judge is going to get mad if we go to him. We already went to the judge and we asked a question. I said, "No, the Judge won't get mad."

Q. No, I won't get mad.

A. You are human like everybody else. Why can't we come to you if we have a question? We already came to you one time.

Q. You can do that as many times as you want.

A. Like I say, I refused to vote. That was when they yell at me and say, "Come on, I want to continue with my life."

So I suggested why we don't go to the judge? Why we don't send a note to the judge and let the judge to explain, okay, if we can do this or not?

Q. You can do that.

A. "We can't go to the judge. We already went to the [8869] Judge one time." That was the answer.

Q. You tell them that you can do that.

A. As many times as we want to?

Q. As maybe times as you want.

THE COURT: Are there any other questions?

MR. RYAN: No, Judge.

JUROR ALFONSO: Well, does anybody else want to ask me questions? I guess you do want to hear.

Q. They want to, but I am not letting them.

A. My panty hose has holes. I am telling you.

Q. You may go back in now, Mrs. Alfonso.

A. Like I said, Judge, maybe working in the courthouse didn't do me any no good for being here, but I can't help it.

THE COURT: That's all right. You go ahead back, and thank you very much.

(Juror excused.)

* * * *

[8933] (Juror Grant entered chambers).

EXAMINATION BY THE COURT:

A. Good morning.

Q. Good morning, Ms. Grant. How are you?

A. Okay.

Q. Sit down, please. We are doing a little investigation into some problems that you all have had. We will only be a moment or two. I want you to relax, and everybody here is [8934] friendly to each other and to you, and so just listen carefully to my questions, and we will only be a moment two.

I want to assure you that by asking you these questions, I am not trying to direct you in any way as to hat you should or should not do.

I simply am looking into some observations that have been made by some of the other jurors, and I want to ask you the same questions essentially that I asked them.

Don't tell us anything about what you are doing unless it is in a direct answer to my question. Don't volunteer anything. Don't tell us what the numbers are who is for what and who isn't for what and so forth. All right.

A. Yes.

THE COURT: Did somebody say something?

MR. RYAN: To lower their voices, Judge.

Q. Since you started your deliberations, have all of the jurors deliberated? Have they all been involved in the deliberations?

A. Yes, we have.

Q. We have been told that one juror has refused to do so. Is that accurate?

A. I don't think so.

Q. Tell us what you mean by that?

A. Well, we have been debating, and I know the jurors [8935] have, some of complained about people acting nonchalant with and body language, and whatever, but I think we've all been participating.

Q. Is everybody deliberating at the present time?

A. Yes.

Q. That is, everybody shares ideas and suggesting what should and should not be done?

A. Some more than others.

Q. Is there anybody who isn't?

A. I could not say that.

Q. Has anyone made the statement in your presence that you did not have to follow the law in the instructions?

A. Not in that manner. It was brought up about we were not following the law, and there was debate about it, but everybody has got a different interpretation and everybody is voicing their little whatever, and we have not been all getting along.

Q. I gather. Well, let me be more specific. Has any juror said in your presence that, "It is not necessary for us to follow the law in the instructions?"

A. I think somebody thought they heard that, and they brought it up to the person, and the person denied that they said that.

I know sometimes they say, "Well, you said so and so and so and so," and then we get off track, but I think [8936] that everybody is trying to do their best in there and everybody is trying to, you know, give everybody a fair chance, but it has been rough.

Q. Has anyone threatened else in any way?

A. The first day we started deliberating, it got rough. I got a little upset myself, but the second day we all made up. We corrected our actions and we apologized and said, "If you feel that we are attacking you," because personally I thought I was being attacked, and I am not an easy person to give in and you run over me.

So I said, "Hold up. Let's get it together," and we all now we respect one another, I believe, and we are trying to do the best job we can. So after that first day I think we calmed down.

Q. Have you heard any threats since the first day?

A. I heard some statements that we thought that there was threats. We stated it. We corrected it, and I think we are over that hump, but at first some of it was like I think it went too far, but I think we are doing better now.

We understand each other now. We are trying to reread those instructions over and over and over again, and I think we are doing much better. Now we are a group. Before we were not.

THE COURT: I think that's all I have.

MR. RYAN: Nothing else.

[8937] THE COURT: Does anybody want to submit a question to me to be asked?

MR. MOFFITT: Your Honor, on behalf of Mr. Abbell, I don't want to submit any questions.

MR. ASBILL: Nor do I, Judge.

MR. MORAN: We have a couple of questions.

MR. PEARSON: Number 2.

THE COURT: Number 2. If that is the one with the arrows pointing to it, do you want to show that to Mr. Moffitt?

MR. PEARSON: We oppose that question, Judge.

MR. MOFFITT: Your Honor, if the Court wants to ask that question, I don't object to it. Thank you, sir.

THE COURT: Thank you. I am not going to ask this question because I don't think it is in accordance with what we originally talked about.

Let me be frank with you. One of your jurors has been singled out as being the person who would not cooperate. You probably know who I am talking about. Do you?

A. Yes.

Q. Has anyone threatened that person by saying, "You know, if you don't cooperate with us, your name is going to appear in the newspapers," or anything like that?

A. Yes, it was said, but I think we corrected that. The [8938] other jurors, they got to say, "We are not going to be threatening each other. That's not the way we are going to

work here." So I think our differences that we had is all over. It is fine.

THE COURT: All right. Good. Well, I am going to let you go back, and please don't tell any of the other jurors what we have talked about.

JUROR GRANT: Of course not. They didn't come back and tell me nothing.

THE COURT: Well, then, you do the same.

JUROR GRANT: Okay.

THE COURT: Thank you, Mrs. Grant.

JUROR GRANT: All right.

(Juror excused)

* * * *

[8939] THE COURT: Good morning.

[8940] JUROR MANDELL: Hi.

THE COURT: Good morning.

BY THE COURT:

Q. Hi. How are you?
A. All right.
Q. We didn't want to exclude you from this honored process of questioning the jurors. We, obviously, recognize that you all are having some difficulties.

I don't want to you tell us what you are doing in terms of who is for what and what the numbers are, or anything like that.

There have been certain comments that have caused us to want to investigate what may be irregularities. We are not sure; and so be careful, Ms. Mandell, only to answer the questions that I ask you and not to volunteer anything because we are not entitled to know the intimate workings of the jury process, but we are entitled to know if there are some

irregularities that have taken place, depending on what they are.

Now, first, since you first went in to the jury room after I said to go back and deliberate, have all of the jurors been deliberating?

A. There is one person who has made some statements that that person was not willing to consider anything. We have discussed the process. We have read the instructions [8941] numerous times. We have discussed the instructions.

It is hard to tell whether that person is cooperating. That person did make a statement. It is not as if they sat there totally quiet, but has not said anything in a couple of days.

Q. Did that person at any time make statements regarding whether or not she would follow the law?

A. It was hard to tell whether she understood what the law was. In my business, I analyze whether people can use language. Okay. So I was trying to figure out whether she was understanding the language, and I am still confused about it.

Q. About what?

A. About whether she understands the language that is written on the pages. She did make a statement, but she was being very emotional, and I confronted her and said, "Try to think before you speak."

Q. What was the statement first before you confronted her? What did she say?

A. That she couldn't go by the way this law was written, and we told her that she didn't have that option. That this was the law. This was given to us.

Q. And what did she say to that?

A. She then argued that she was willing to listen to the law. So she's given us lip service that she is willing to [8942] do it, but because she sits there without talking, it is hard to know what is going on.

She came in with her mind made up. I think of the whole jury, probably two people came in with their mind made up. Everybody else has been kind of listening and negotiating and thinking and re-evaluating the law and reading the indictments. The counts. I am confused about her.

Q. Yes, I understand. After my instruction to you all on Thursday, did she have anything to say one way or the other about that instruction?

A. She was very angry. She felt that it had been directed at her. She didn't know that a note had been sent, and half of the jury didn't know that a note had been sent.

She said she might as well just leave right now, and everybody just sat there quietly, and then she did an about face and said, no, she could participate in the process, but I haven't seen any evidence of it.

Q. Did you know that she sent us a note Monday morning saying that the jury was hopelessly deadlocked?

A. We found that out about an hour into our deliberations, which is when we suggested that another note sent saying, "The rest of us don't feel that way."

I don't feel that we are hopelessly deadlocked. At least I don't feel that 11 of us are. 11 people seem to [8943] be willing to go through the process as you have explained it.

Q. Has she deliberated at all since Thursday?

A. She really has not said anything. She has voted, but she has not said anything Monday, Tuesday or Wednesday. There are some vocal people, and she kind of sits there like this.

Q. Demonstrating her hands crossed over her chest?

A. Right.

Q. Has anyone threatened her in any way? When I say "threatened" I mean been abusive to her?

A. I think she interpreted some angry remarks as being abusive to her. People have said, "Come on. You have got to get with the program."

A couple of people have used very angry voices. I think she took that very personally.

Q. Do you feel that she is genuinely deliberating?

A. I think she is giving the appearance now that she is reading the instructions; that she is listening to what is being said.

If the definition of deliberating is actually verbal participation, no, she is not doing that, but she does appear to be listening. I don't think she's changing her votes on anything. I mean, she's made that perfectly clear.

[8944] Q. What was it she said when she first came in? You told us a statement when she first went in as you went in to deliberate.

MR. PEARSON: Judge, I am sorry. Without telling us if her statement has anything to do with how she has voted.

THE COURT: Oh, yes. I don't want to know which way she is aimed.

A. She did not believe the law. She did not accept the way that it was written. She felt that we should interpret it. Is that what you are referring to?

Q. No. It was something about, "I have made up my mind. I don't want to talk about it anymore," or something.

A. Right. She has said that.

Q. And she said this at what juncture?

A. At the very beginning. She has not said that this week that I recall.

Q. Has anyone mentioned to her that if she was the hold out that she might appear in the newspapers, or anything like that?

A. Someone in the heat of passion said some things like that.

Q. Was it repeated?

A. I think after it was said, the person was sorry that they said it, and kind of backed off from it, but it was not [8945] a pleasant remark.

Q. Yes.

A. And I don't know if she's paranoid to begin with, but I would have been upset if somebody had said something like that to me.

Q. Yes. And this happened at what juncture?

A. At the very beginning.

Q. The very beginning?

A. Yes. Maybe the second day.

THE COURT: Any questions that are suggested by counsel?

MR. MOFFITT: Yes, Your Honor.

Q. Incidentally, in relationship to your question this morning about the 29th of July, we hope that that is purely academic.

A. Yes, I was hoping so.

Q. However, if it isn't, I am sure we will work out a way to accommodate you to some extent.

A. Thank you.

MR. PEARSON: Is the Court considering giving this?

THE COURT: Well, I want to get some expression. Not in detail, but just yes or no from you.

MR. PEARSON: No problem with this one, Judge.

THE COURT: All right.

[8946] MR. PEARSON: And this one we think is inappropriate.

THE COURT: All right.

Q. When did you find out about that first note that came in, the one that mentioned the problem that you had in the first instance?

A. The day that it was written. Actually, I think the person wrote it the night before and brought it in, showed it to those of us who was there to see what we thought of it. Maybe half of the jury saw it and said, "yes, go ahead and send it," and it was sent.

Q. Ms. Sebastian apparently signed it?

A. Yes.

MR. PEARSON: Which note are we referring to, Judge? I am sorry.

THE COURT: I assume the first note that we got. Not the one about the predicate acts.

MR. MORAN: Mr. Gooden's.

THE COURT: But the note from the male juror, alerting us to the claimed problem.

MR. PEARSON: Yes, sir.

THE COURT: Right.

MR. MOFFITT: Your Honor, let me write another one out.

BY THE COURT:

[8947] Q. How many of you were present when you looked at it?

A. When I personally looked at it?

Q. Yes.

A. Maybe 3 people in the room. 3 or 4 people.

Q. How many of the jurors saw it before it came back to me?

I am not sure. I think about half. I know that one person in particular was very upset that she had not known about it and brought it up to us and said that, "If there are going to be notes sent, it would be nice if everybody knew," and we said, "Yes, we agree with that."

Q. And that was it?

A. But that has not happened.

Q. That was what, Thursday or so. No. It has not happened. I understand. But that was Thursday, was it, that we got that note or Wednesday?

MR. PEARSON: Thursday.

MR. RYAN: Thursday first thing, Judge.

THE COURT: Okay. Are there any other questions?

MR. MORAN: We had one submitted.

THE COURT: Yes. I am not going to ask that one. We will have to figure that out some other way. Thank you, ma'am.

A. Okay.

Q. Please don't discuss what we have talked about with the [8948] other jurors.

A. Yes.

THE COURT: Thank you.

(Juror excused)

* * * *

[8950] JUROR ROSSO: Good morning.

THE COURT: Good morning, Mr. Rosso.

BY THE COURT: How are you?

A. Fine.

Q. Sit down, please.

A. Thank you.

Q. We just want to ask you a few questions. I trust you are feeling well this morning?

A. Fine. Thank you.

Q. Please answer the questions I ask you directly and don't volunteer anything. We are not entitled to know where you stand, who is for what, who is against, who is for and [8951] so forth.

A. I understand.

Q. We have had some information about what may be some irregularities taking place in the process, and I simply wanted to ask you a few questions about those.

A. Certainly.

Q. First, since you all went into the jury room, have all of the jurors been genuinely deliberating?

A. No, sir.

Q. It would not be amiss to tell you that we are aware of a complaint about one juror, a young woman who has, depending on who you talk to, has not been deliberating. Is that who you are talking about?

A. I believe so, yes, sir.

Q. Has this person expressed any opinion about whether or not the jurors need to follow the law in the instructions?

A. At the beginning when we were first together.

Q. And what did this juror say?

A. As I recall, I believe that when we were discussing the instructions that you gave that we needed to follow those, and the comment I believe was made that, "Well, this is taking the instructions"—"Well, this is from the Judge. This is not the law," and I think we tried to tell the person that, "No, this is the law, and it is the instructions from the Judge that we have to follow."

[8952] Q. And what did she respond?

A. Just sort of like gave a negative body language like this.

Q. With her arms crossed?

A. Crossed and just—

Q. Looked up?

A. Yes.

Q. How early in the deliberations was this?

A. I believe it was the first or second day. I know it was early on. I am kind of confused on the time now.

Q. Yes, I understand. You have been at it now what, 7 days I think collectively. We are in our 7th day, I suppose. I

gave an instruction on Thursday about that; you may recall last Thursday about the need to follow the law and the instructions.

A. Yes, sir.

Q. Did she make any comments after that about what I said?

A. I don't remember.

Q. Was she upset about that instruction?

A. Actually, I think that it was the same body language from what I can recall.

Q. Has she deliberated genuinely deliberated since that time?

A. Not in my opinion.

MR. MOFFITT: Your Honor, I object to the word [8953] "genuinely."

THE COURT: Let's strike the word genuinely.

Q. Has she really deliberated since that time?

A. In my opinion, no.

Q. Has she made any further statements about whether or not the jurors needed to follow the law?

A. No, sir.

Q. So that I don't misconstrue what you say by asking you if she has really deliberated, has there been any type of communication with her regarding the case and the counts and the indictment and the law since she took her first position? Any kind of communications from her or just tell us what she has done?

A. Well, in the beginning—I am not sure on the dates—that she gave her opinion on a lot of issues that were really not related to anything about the trial, and for at least 40 minutes or more.

Q. Was there some comments about what she perceived to be reality?

A. Yes, sir. And yesterday the only evidence that she's actually looked at—I mean, if I can say is just looking at the

photo album, and yesterday she was doing her nails and to me, to quote Mr. Ristau, I am just outraged about it.

THE COURT: Are there any questions you would like me to ask? Yes.

[8954] Q. Has anyone threatened her in any way at any time; any kind of threat whether it is meaningful or not?

A. Not in my opinion, no, sir.

Q. Did anybody mention anything about her being in the newspapers if she was the juror that caused a mistrial?

A. That, yes, sir.

Q. When did that happen?

A. Early on.

Q. Early on. Was that a male juror a female juror?

A. Male.

Q. Okay. Has that been repeated since that time?

A. I don't think so.

Q. I assume you have taken votes from time to time. Votes.

A. Yes, sir.

Q. Have you gotten past Count I? Don't tell us what you have done. Just tell us whether or not you have gotten past Count I?

A. With a firm decision?

Q. With a firm decision.

A. No, sir.

Q. Have you discussed any other counts at all?

A. Yes, we have.

Q. Have you voted on any other counts?

A. Not firm votes, no, sir.

[8955] Q. Has she voted?

A. Yes, sir.

Q. In any votes that were proposed, did she vote in those votes?

A. Either guilty, not guilty or undecided, yes.

Q. She voted in all of them?

A. Yes, sir.

Q. Do you have a third category called "undecided."

MR. PEARSON: Judge, I don't know if we should get into that. Although it is interesting, I am not sure we should pursue that.

THE COURT: I guess. It is interesting, though.

Q. Do you know whether or not she is listening to what you all are saying? Can you tell?

A. Personally, I cannot tell.

THE COURT: Okay. I have nothing else. Anything else from counsel?

MR. RYAN: No, Your Honor.

MR. MOFFITT: No, sir.

THE COURT: Mr. Rosso, thank you very much. Would you, please, not mention anything we have talked about with the other jurors.

JUROR ROSSO: Certainly.

THE COURT: Thank you.

(Juror excused)

* * * *

[8956] (Juror present)

BY THE COURT:

Q. Good morning.

A. Good morning.

Q. How are you this morning?

A. Pretty good. Thanks.

Q. We are trying to get—we want to talk to all of the [8957] jurors, and we wanted to get some information about some matters we have heard about.

I don't want you to tell us anything about what you all are doing in there unless it is in a direct answer to the question that I ask you.

A. Okay.

Q. Just relax. This is a very informal proceeding. Listen carefully to my question and don't volunteer anything because we are not really entitled to know what you are doing, the detail of what you are doing or how you are doing it, except insofar as there may be some irregularities that we do need to know about.

Since you folks went into the jury room after I said, "retire to consider your verdict," has everybody been really deliberating?

A. Yes.

Q. We have been told that one juror, a young lady, has not been.

A. Okay.

Q. Is that accurate?

A. I am not going to say it is 100 percent accurate, no.

Q. How many percent accurate is it?

A. I would say 50/50.

Q. 50/50?

A. I mean, if you want me to be more specific, God, it is [8958] hard to tell. Some days, yes, some days, no, but then again I mean if by saying deliberation, if you mean like sitting there—

Q. Discussing evidence.

A. Well, I have to say some days, yes, some days, no.

Q. Wanting to participate in the discussion. Arguing for a point. Things of that nature as you all are talking?

A. Some days yes, some days, no.

Q. Some days yes, some days no. Did this person, upon coming into the jury room, announce a decision before the deliberations began? Don't tell us what it was.

A. From what I recall, no.

Q. Did this person at any time say, in one fashion or the other, that it was not necessary to follow the Court's instructions on the law?

A. Yes.

Q. When was that said?

A. Some time during the first week. Probably around the second day. I am trying to figure it out. We started late Monday. Probably around the second day. Maybe also the third day.

Q. Do you recall what she said?

A. What I recall was that—I think the problem—okay. I mean, not to screw up the subject, from what I recall, she had a misunderstanding about what was meant by jury [8959] instructions.

There is various definitions as to what instructions can be, and from what we gathered, she had the wrong understanding of what the difference was between jury instructions and instructions of how to get to I-95. So those are pretty much it.

Q. She thought they are like instructions as to how to get to I-95?

A. Exactly, yes.

Q. What did she say? "We don't need to follow the instructions," or "We do need to follow them?"

A. "We don't need to," and then she elaborated by saying well—I mean, I don't know if I am supposed to say this, but she elaborated by saying, "You know, those are just the Judge's instructions. Those are just Judge Hoeveler's instructions. I can get instructions from somebody on how to get to Burdines," and she just kept comparing that definition of the instructions to like, you know, instructions of how to—

Q. To get to I-95?

A. Right. Right. So we just gathered she just had a misunderstanding as to what that was.

Q. Was anybody able to convince her to the contrary?

A. No. For about a day and a half, maybe two days, no.

Q. I instructed you on Thursday about the importance of [8960] the instructions and the law. Did that apparently change her mind?

A. I don't know because after that, especially after that she became pretty non-verbal.

Q. Angry?

A. After that day, I don't know about angry; just not as talkative as the first days before your meeting with us. So I don't want to interpret her body language.

Q. No, I understand. That's a wise response.

Has she said at any time anything that would indicate that she has come off that feeling that these instructions are just like trying to find a road or a mine or it could be anybody else's?

A. From what I can recall, no, not really.

Q. Has anybody threatened her at any time in any way, whether strongly or not strongly?

A. Well, somebody said something, but I am not sure if it was a threat or not.

Q. What did that somebody say? A man was it?

A. Yes. Somebody said, "Well, you should just get off the jury then." I don't know if that's a threat or not.

Q. Did anybody say that—well, first, was that in response to any particular statement she made?

A. Yes.

Q. What statement was it?

[8961] A. I can't remember what it was.

Q. Has anyone suggested to her that if she caused a mistrial in this case her name might appear in the newspapers?

A. Yes.

Q. The same person who said it?

A. The same person, and I think one other person.

Q. A man? Woman?

A. A man, but actually, okay, the other person didn't say her name specifically, but he made a reference to the fact that,

"Whatever decision you make, it is going to be in the papers and the whole world is going to know."

Q. Has she participated in the voting?

A. Yes.

Q. Each time you voted?

A. I am trying to think. The first week, yes. Yes. I would have to say, yes.

Q. How do you feel about the jury deliberating right now? Is everybody right now deliberating? I use the words "really deliberating." Genuinely wanting to participate?

A. I would say the first week more than the second week, but, yes.

THE COURT: Any other questions?

MR. MOFFITT: Yes, Your Honor.

THE COURT: I think I may have covered that, but [8962] I am not sure.

MR. MOFFITT: I think you asked the negative of it because you didn't ask the positive.

MR. SREBNICK: Judge, my question is not the content but whether there has been any expression.

MR. PEARSON: We oppose that, Judge. I think you have covered this.

THE COURT: All right. Let me ask you this question.

Q. We understand and, obviously I have talked now to I think 9 of the jurors, that at some point she expressed an opinion about why she was doing what she was doing and was talking about reality. Do you remember that?

A. Somewhat, yes.

Q. During that time, did she discuss anything about the evidence in the case?

A. No.

Q. Has she ever discussed anything about the evidence, her view of the evidence in the case? Don't tell us what her view was, but has she expressed a view?

A. Yes, sometimes.

Q. Has she considered the evidence presented by both sides or one side?

A. One side.

Q. One side. Has she considered the evidence presented by [8963] the other side, whatever that other side was?

A. No.

THE COURT: I think I've gone about as far as I should.

MR. RYAN: Yes.

MR. MOFFITT: Your Honor, you will not ask that question about since your instruction?

MR. PEARSON: I think you have covered that, Judge.

THE COURT: I think I did. I will ask it again.

Q. Since I gave the instruction about following the law, has she made any comment one way or the other about that instruction or the other about following the law?

A. No.

Q. What did she say?

A. The way you talked about was directed toward her specifically and nobody else.

Q. And?

A. That's all I can recall.

MR. MORAN: I am sorry. I didn't hear that, Your Honor.

A. Oh, I am sorry. That what Judge Hoeveler had addressed was geared specifically towards her and nobody else. I can't recall anything else.

Q. But again she didn't say something like, "Well, I am [8964] now going to follow the law, or I am not going to follow the law." Not one way or the other?

A. No, no.

THE COURT: Okay. Thank you, ma'am.

A. You are welcome.

Q. Please don't discuss what we have talked about with the other jurors.

A. Okay.

THE COURT: Thank you.

(Juror excused)

* * * *

[8967] (Juror Cortes entered chambers)

Q. Good morning.

A. Good morning.

Q. How are you this morning?

A. Good. Thank you.

Q. Good. Good. I want to ask you a couple of questions about some matters that we have been told that are going on in the jury room. Relax. Sit down and sit back.

I don't want you to tell me anything about what is going on in there except in direct answers to the questionsthat I ask you. We are not entitled to know who is for what, who is on this side or that side, or anything like that.

We have gotten some information that maybe one or two things have been irregular in these proceedings, and that's the purpose of talking to all of the jurors. So we didn't mean to make you near the end, but we just have been following kind of a procedure.

It is a little haphazard, so just be careful about [8968] what you answer. Answer only the questions I ask you.

A. Okay.

Q. Since you first went in to deliberate, that is to exchanges ideas, to talk about the case, to argue it, that is what deliberate means, has there been anyone of the jurors or more who have refused to deliberate?

A. Well, yes.

Q. How many?

A. One.

Q. A woman?

A. Yes.

Q. We shouldn't play games with you. We know who that is. When did that person announce whatever she announced? Don't tell us whose side she is on, but just when did she indicate that she wasn't going to deliberate, if she did?

A. Pretty early on.

Q. Since that time, since that first indication, has she participated in the deliberations in a real way?

A. Maybe once or twice.

Q. Did this juror say anything about whether or not you folks needed to follow the law that was in the instructions?

A. No. That's one of the problems.

Q. What was the problem?

A. Following the law. Following the rules that you told us about.

[8969] Q. What did she say about that, if anything?

A. At one point, one time—I don't know if she spoke and didn't really mean it in that direction, but she said that she was not going to follow the laws. I don't know if I interpreted it a different way or we interpreted it a different way, but keep going on with the laws, anyway.

Q. And did she indicate that more than once?

A. Probably not. Maybe once or twice. That's about it.

Q. Ones [sic] or twice?

A. Yes.

Q. Has she indicated at any time since I gave my instructions on the need to follow the law that she was going to do that or wasn't going to do it?

A. No, she hasn't.

Q. She didn't say anything one way or the other?

A. No.

Q. Do you know whether or not she was upset when I gave that instruction?

A. She wanted to send a note in to you, or why she was not aware of that.

Q. She had not been aware of the note that went in?

A. I don't think a lot of us were.

MR. MORAN: I am sorry, Your Honor. We cannot hear.

THE COURT: "I don't think a lot of us were."

[8970] MR. MORAN: Oh.

Q. How many of you were aware and were not aware that that note—that was Mr. Gooden's note that you are talking about?

A. I was aware after it had been sent, but before we came in I had found out.

Q. Is she deliberating in a meaningful way now?

A. No, she is not.

Q. Has anyone threatened her in any way, whether it was a serious threat or not any kind of a threat?

A. I've never deliberated. I have never been in a case, so I don't know what is normal or not.

Q. Well let me be more specific. Has anyone said to her that, "If you cause a mistrial, your name is going to appear in the newspaper?"

A. I think maybe a scenario was given. I don't know if it was directed straight to her.

Q. You don't know if it that was directed straight to her?

A. It was directed.

Q. A general statement?

A. Yes.

Q. Now, I assume—although please tell me if I am wrong—I assume no one has threatened her physically?

A. Oh, no.

Q. There is nothing wrong with people getting upset when [8971] they are deliberating. That happens all the time, but it is not appropriate for people to threaten each other in any way. Has that happened?

A. I don't think so.

MR. ASBILL: I am sorry, Judge. I couldn't hear the response.

THE COURT: "I don't think so."

MR. ASBILL: Okay.

Q. You have had several votes during the progress of these several days. Has she participated in that voting?

A. She has voted, but with no comments.

Q. No comments. But she has voted. Yes?

A. Yes.

Q. Now, since she mentioned to you that, however you put it, she didn't need to follow the law, has she changed that statement in any way either by what she said or what she's done in any way? Has she, to use the vernacular, has she backed off that statement?

A. I believe she has.

Q. In what way?

A. Well, she has not said it again.

Q. She has not said it again?

A. And she has gone over—when we read the laws again, she has been there listening.

Q. She is listening?

[8972] A. With no opinion.

Q. No statement one way or the other?

A. No, no statement. I think her interpretation may be different when she reads something. I think—I don't know if she fully understand [sic] what she is reading. She is interpreting it I think in a different manner.

Q. I don't mean to suggest this, but I can't think of any other way of asking the question at the moment.

Do you think her language problem has anything to do with this?

A. I think she understands English very well and she can read it and speak it very well, but in one instance I sat with her and read it over, and I saw that she just didn't have that

she—didn't make that connection; at least in what I saw. She didn't make the same connection I did, anyway.

Q. Did you ever hear her referring to the instructions in this way:

"I don't have to follow the Judge's instructions. They are advisory. It is like trying to find your way to I-95.["]

A. That's basically what she said. That's basically it.

MR. MOFFITT: Was that prior to the instruction?

JUROR CORTES: Prior to the instructions.

THE COURT: All right. Is there anything else?

[8973] MR. RYAN: No, Judge.

MR. SREBNICK: Excuse me, Your Honor. With the Court's indulgence for just one minute?

THE COURT: Yes.

MR. SREBNICK: Judge, I proposed the question last time that you asked about expressing an opinion.

THE COURT: Yes.

MR. RYAN: This was something that you mentioned before, Judge. It is up to you. I am just identifying it.

THE COURT: Yes, of course.

MR. MOFFITT: Your Honor, I don't have any objection.

MR. MORAN: What is the question?

MR. MOFFITT: Number 1, Mr. Ryan's questions, since I raised it just a minute ago. Number 2, I would object since it has not been raised with everybody.

MR. RYAN: Well, that is why I identified it. It was something you had identified first. They are really not my questions.

THE COURT: Could I have that back, please. Thank you.

Q. During the several days that you have been together, has she—I don't want you to tell us what her opinion was, but has she expressed any opinion about the evidence?

A. No, no, she hasn't.

[8974] Q. Has she discussed the evidence in any way?

A. Not in the last few days.

Q. At all?

A. At all.

Q. How about before that?

A. Yes.

Q. Has she discussed everybody's evidence or just the evidence for one side?

A. Now she has not discussed the last few days. She hasn't discussed either way. Before she was probably discussing, you know, with everyone.

Q. One side or both sides?

A. One side.

MR. SREBNICK: Your Honor, can you clarify that; if that evidence included testimony and not just exhibits.

Q. When I say "evidence," do you mean both testimony and exhibits?

A. Yes, both.

Q. Did she make any comment to you folks about reality and what that means?

A. Reality. I can't remember specifically. We have been talking about a lot of things.

Q. The note on Monday morning that you all were hung and couldn't agree, did you know that note was coming out?

A. No, I did not know. I know that there was a note, but [8975] it wasn't shared with anybody.

THE COURT: Okay. Now, that's all I have, counsel

MR. RYAN: Yes, Judge.

THE COURT: We thank you very much. Please don't discuss this with the other jurors.

It has been an interesting experience, hasn't it?

A. Very much so.

THE COURT: You may go back. Thank you.

JUROR CORTES: Thank you.

(Juror excused)

* * * *

(Juror Butler entered chambers)

JUROR BUTLER: Good morning.

BY THE COURT:

Q. How are you this morning?

A. Hurting, but I am here.

Q. Well, you are mighty good to do all this under the circumstances.

A. No problem.

Q. We have heard that there have been some—I don't know whether to describe them as irregularities, but some things that have gone on in the jury room which I want to ask you [8976] about, but let me assure you that we are not entitled to know what you are doing or who is on what side or who is for what or against.

So don't, please, tell us anything about that except in answers to questions I may directly ask you about that. Don't volunteer any information. We are not entitled to know very much about what you are doing, but it has come to our attention that there may be some problems, and I want to ask you some questions about those problems.

First, Mr. Butler, since you all went in to deliberate, have all of the jurors deliberated in a meaningful way; that is, genuinely deliberated?

A. Yes.

Q. It has come to our attention that one juror, a young lady who we all know about, may not be. What do you say about that? Do you know who I am talking about?

A. Yes.

Q. I want your opinion.

A. In my opinion, I don't think she understands your rules of the law that you passed to us. I am not saying that she's a bad person, or anything.

Q. Oh, no. Nobody is suggesting that.

A. I don't know if it is maybe hard for her to comprehend the law, you know. I mean, you have read the law; the law and the stipulations and everything to us, and it is kind of [8977] like hard for her to in my opinion—I don't know about the rest of the jurors, but it is kind of hard for her to understand what the law is applied to us the jurors.

We tried to explain it to her, and in certain ways maybe she would understand, but it is like it is going through one ear and coming out the other one. She is steadfast on certain things, ou know, which is her right.

Q. Yes. Has she said to any of you that you don't need to follow the law?

A. Yes.

Q. How has she said it?

A. For one time she said something like she don't need to follow the laws to come to a unanimous or rather a reasonable verdict.

In other words, to me she was saying that the law that you read to us was wrong in her—you know, in her words. Then that's when all of us kind of like went through the roof and said that, "You must apply to these laws because that's the oath that we took the very first day."

It is like she cannot comprehend because she keeps saying about, you know, because she works in law enforcement, and all that; that certain laws don't apply and all that, but it is like she's refusing to follow the law.

She says she is listening, but then again if she is, it is like I say going through one ear and coming out [8978] the other, and all that.

Q. Did you hear her say anything like, "The Judge's instructions are just advisory. It is like trying to find your way to I-95," or something like that?

A. No. I didn't hear nothing like that, but if I am not mistaken, I heard she said that the judge the rules that you applied to us—maybe I am wrong, but, you know, because everybody was throwing things back and forth.

Q. Tell us what was said. You won't hurt my feelings.

A. She was saying that what you said did not—well, in other words, what you said was not the law.

MR. MOFFITT: When was that in terms of this?

Q. When did that type of statement occur? Let me give you a reference point. Was it before or after the instruction that I gave last Thursday?

A. It was before.

Q. How about after that instruction, did she say anything about that instruction or about whether or not she changed her mind?

A. No, because after we—you know, after we came back from that day and when you read the instructions to us, it was like—she said something like the reason why we was down there was because of her, and it was not directed to anyone else but her, you know, and she was kind of like upset about it, but she always said that she is following [8979] the law, but every day when we try to go through certain things, we always read the law from the transcript that you gave us to make sure that everyone understands, and she always says she understands. She understands. She will abide by the law, but it is kind of flaky you know, on her part.

Q. Well, did she ever tell you that anything like this, "That statement I made about not following the Judge's

instructions, I have changed my mind. I am now going to follow the Judge's instructions?"

A. Yes, she did.

Q. She said that?

A. Yes.

Q. "I am going to follow his instructions." When did she say that?

A. Let's see, I think the same day—well, the day after we came back from—after we went home that day when we came down; when we came that day to your chambers, and I believe it was the following day.

Q. I am not sure I know which day that was.

A. Okay. I think it was—it was Friday. I think it was that Thursday of last week.

Q. Yes. You were off Friday.

A. Right. It was Thursday.

Q. Thursday was when I gave the instruction.

[8980] A. Right. So it was probably that Monday when we came in.

Q. That Monday. That's the Monday that she sent a note in to us that you were all hopelessly deadlocked?

A. Yes, which was wrong on her part because we didn't know nothing about that note because she did not—from what I understand about the law, I don't know that much about it, but if the jury is hopelessly deadlocked, it must be in agreement with all 12 jurors, not just one individual.

So we didn't know nothing about that note until she told us, and we said, "That was wrong for you to send a note to the judge saying that we are all deadlocked without confirming with all the rest of the jury," which we are not deadlocked.

I mean, we are going through certain things. We are talking about it. We are reading the evidence, and everything, but we are not hopelessly deadlocked.

Q. Not even now?

A. Not even now. There are some things we disagree about, but, you know, there is 12 jurors that have different opinions with 12 different characteristics.

Q. Yes, of course. That's the way it should be.

A. And all 12 of us are stubborn in our own way.

Q. No problem with that.

A. That's only being human.

Q. Yes. Is she deliberating now do you think?

[8981] A. Yes, yes, because at some point she is like swaying the other way. I think she's actually listening.

Q. Okay. Has anyone threatened her in any way?

A. No. I mean, it wasn't like a threat. It was like, okay—we have one—okay. We have the forewoman, not the foreman. The forewoman. Okay. And we have the other guy who is like showing us displays and going through the exhibits, and everything.

Q. Kind of the leader?

A. Well, second in command and which she is doing a good job about it, and sometimes like when we come to a conclusion, you know, and we get ready to vote, she says, "I don't understand. I don't think this. I don't think that," and then the guy says, "Well, we are showing you the evidence."

It is like he is—you know, voices get raised to a certain level, and she takes that as a threat. Okay. Two jurors at the beginning of the deliberations took it as a threat, which I didn't think it was a threat. It was just people trying to voice their opinions, and they took it the wrong way as a threat, and the guy here apologized, and everything, but after a few days, one of the other women said that, well, once she realized it was not a threat, she was all right.

They felt like it was a little like an [8982] intimidation; you know, a man and a woman's face across the table from her pointing, and stuff like that, saying—me, myself, I am just a mellow guy just sitting back and taking it in.

Q. All right. Did you hear anybody say to her that if she didn't cooperate, she was going to appear in the newspapers as the one who caused a mistrial? Did anybody say that?

A. No. It was nothing like it would appear in the papers. It was saying like if it was something like a mistrial, or something like that, the news media would like to know who was the juror that—

Q. Caused it.

A. Caused it, and a lot of them said that it was their right to say who it was, which I don't think it is their right to tell the news media which juror was the one that caused a mistrial because, frankly, I don't think it is the news media's business because I think it is between the 12 jurors.

I know maybe the prosecution and the defense and yourself would eventually know, but I mean they was saying that once we walk out of the courtroom, the news media is going to be there, and then they will be hounding us about who and what and when and where and how, and all that, and with me, I don't know nothing.

I am just hoping along like Fred Sanford and go [8983] into my car and go on home, but it was like—it was like this thing called fear.

Q. Prejudice or sympathy?

A. Prejudice.

Q. Sympathy?

A. Sympathy, right. She was trying to define the word on fear; you know, like fear of after the trial, the fear of, you know, if we come to a verdict, or whatever, guilty or not guilty, the fear of what the prosecution might say or fear of what the defense says.

Q. They shouldn't be afraid of anything.

A. Right. Plus the fear of what would happen with the news media and all that. I say you shouldn't be afraid of anything, you know, because—

Q. That's right.

A. No one is going to be coming after you because of your verdict, you know. So I am not afraid.

Q. Excuse me?

A. I am not afraid of nothing but God himself. That's it.

Q. Amen. Do you feel that the jurors are deliberating meaningfully now?

A. Yes, yes.

Q. Including this juror?

A. Including the juror.

Q. Is she saying anything?

[8984] A. Well, she gives her—I mean, you know, like if she comes to a verdict, a certain verdict, I am not going to say guilty or not guilty—if she comes to a certain verdict, she is right now explaining to us why she came to that certain verdict because in the beginning she would not explain to us.

Q. As she explains it to you, is she still on her position that she doesn't have to follow the law, or does she now say that, "I am going to follow the "law"["]?

A. To me, from my point of view, she's saying that she's going to follow the law.

Q. I want to know what she is actually saying.

A. Well, she didn't actually say that she's going to follow the law, but she—well, in a way she did. She says, "I am following the law." That is what she says.

"I am following the law," you know, because some of us tell her, "You are not following the law. You are not following the law that the judge told us to do."

["]I am. I am. I am following the law." That is what she says. She keeps insisting that she's following the law.

THE COURT: All right. Anything else, folks?

MR. RYAN: No, Judge.

MR. MOFFITT: The first note I would like you to inquire about whether this juror knew about the first note.

[8985] THE COURT: The Mr. Gooden note?

MR. MOFFITT: Yes, sir.

Q. You heard about the note Mr. Gooden sent to us about this problem?

A. Yes.

Q. Did you see that before it came to us?

A. About the problem with the juror?

Q. Yes.

A. Yes, I seen it.

Q. You did see the note?

A. No, I didn't see the note. I didn't see the note.

Q. But you have since then?

A. Yes.

Q. You didn't see it when it came out to me?

A. No.

Q. Okay.

A. To tell you the truth, I didn't know there was a note sent to you until they told me that there was a note sent to you.

THE COURT: Anything else?

MR. RYAN: No, Judge.

THE COURT: Let me see if I have covered it all. I think we have.

MR. PEARSON: The reality question, Judge.

Q. Did this young lady at some point make kind of a [8986] lecture to you all about her view of reality?

A. Her view of reality?

Q. Reality. What reality meant. Do you remember that?

A. I mean, no, not really because there was so much going back and forth.

Q. Yes. Okay.

A. But she did say something about her experiences in the jail system because she's a corrections officer, and all of this and that, but we said that does not have nothing to do ith what we are going through right now.

I mean, it is a very tough case. It is a very—it is to the point like when we were sitting in the jury box we were all friends. Now we are here for 14 weeks, or whatever, and it is like we are getting on each other's nerves; I mean since we got into deliberations.

Q. This is where the rubber hits the road.

A. Right. I mean, we don't dislike anyone, or anything, but if one juror or two jurors or three jurors vote one other way, it is like the ones that voted the most it is, "Oh, God, here we go again," and it is stressful.

Q. Well, keep up the good work.

A. Yes. We are trying.

Q. I know you are. Let me see if there is anything else. These various votes that you have on whatever counts you are talking about, does she vote?

[8987] A. Yes.

THE COURT: I guess that's it. Thank you very much, Mr. Butler.

A. Thank you.

THE COURT: Are you going to have anything done about that situation?

A. Yes. After this thing is over with, I am due to go back to the doctors, and then they are going to set the operation.

Q. They are going to replace the hip, are they?

A. Yes.

Q. Good for you. [P]lease, Mr. Butler, don't discuss what we have talked about with anyone else. All right?

A. No problem.

THE COURT: Thank you very much.

JUROR BUTLER: Thank you.

(Juror excused)

* * * *

[9051] THE COURT: We have another note.

MR. PEARSON: Judge, the note says, "I quit. It is dated 7-17," which means she doesn't quit until Friday. It is effective Friday.

* * * *

[9056] (Juror Grant present).

THE COURT: Sit down, Ms. Grant.

EXAMINATION BY THE COURT:

Q. Are you feeling better? No?

A. I just think I need to relax and settle down.

Q. I can understand that. I have your note. I assume this was written in the heat of impulse.

A. I was mad.

Q. You were mad?

A. Yes.

Q. May we assume that you really don't quit?

A. Well, they talked to me and they said—you know, I don't like to quit things.

Q. Yes, I know.

A. But I am not going to be handled and mistreated.

Q. You don't have to be.

A. And that is what I said. I am not going to let them do this to me.

Q. Well, I wouldn't. But do you think a good night's sleep will make you feel better?

A. I hope so.

Q. Well, you don't quit, do you?

A. No. It was impulsive, and I felt that I didn't want to go to jail, because it was at that point.

Q. I understand. Nobody is going to send you to jail, but [9057] we don't want you to quit. So I want you to go home and get a good night's rest. We will see you tomorrow morning at 8:30. Is that all right?

A. Yes.

Q. If you need to talk to us further, you let me know, would you? All right. You go ahead and go on home, and I am going to discharge the others.

I am going to check it out a bit further this evening, but you go ahead.

A. All right.

Q. And thank you.

A. Thank you.

(Juror Grant excused)

* * * *

[9058] Juror Sebastian present)

JUROR SEBASTIAN: Good afternoon.

THE COURT: I am not going to get into what is happening. I just want to have you—I have not gone over this with counsel, so I want to be very careful in my choice of words.

As you know, Mrs. Grant kind of fled from your presence temporarily.

JUROR SEBASTIAN: Yes, sir.

THE COURT: She's feeling better now. She will be back tomorrow morning.

JUROR SEBASTIAN: Good.

EXAMINATION BY THE COURT:

Q. Without telling us again any of your deliberations, [9059] without giving us any indication of where you are going from a deliberation standpoint, I want to ask you simply is there somebody abusing Mrs. Grant? I don't mean physically.

A. Of course not. No, sir.I think some people are zealous in trying to explain the deliberation process.

Q. Has anyone insulted her?

A. Oh, no, sir.

Q. Has anybody referred to her race, or anything like that?

A. No, sir. No, sir. Those lines were drawn at the very beginning that that wouldn't be tolerated.

Q. Yes. Good for you. So what do you think her problem is so far as you can tell?

A. I think she's tired. I think she's frustrated like we all are.

Q. Is everybody trying at the moment?

A. Honestly, no. I still see a lot of give and take from everybody but one person.

Q. The same person?

A. Yes, sir.

Q. All right. We very much, all of us appreciate the work that you are doing. Unless there is something else, counsel, that you wish me to take up, I am going to let Ms. Sebastian go.

MR. PEARSON: No, sir.

[9060] MR. MORAN: I reached a point Your Honor where I would like to—

THE COURT: There is a question you want me to ask?

MR. MORAN: Well, I don't know. Maybe I will wait.

THE COURT: All right. We can do it tomorrow okay. Thank you.

JUROR SEBASTIAN RYAN [sic]: Okay.

THE COURT: You all may go now.

JUROR SEBASTIAN: Thank you, sir.

THE COURT: Yes.

(Juror excused.)

* * * *

[9078] THE COURT: All right. We have got everybody clued in.

Now, I want to make a statement that I made just a moment ago to counsel who are present in the courtroom. I have given—I don't quite know how to describe—painful consideration to the question of Ms. Alfonso.

We have been batting this back and forth since last Thursday. To say that we have been deliberate I think is an understatement.

I have read Mrs. Alfonso's testimony, her statement in chambers as recently as this morning. I have looked at the cases. I conclude factually that she simply was not answering my questions about her ability to follow the law or her willingness to do so.

I must have asked the question, 3, 4, maybe even 5 times, and each time I got an answer that was I won't say evasive because I can't accuse her of that; certainly not responsive, except in there admissions that what was alleged probably took place as far as her statements were [9079] concerned, and then she tried to explain them, but the bottom line is that she really does not contradict in substance the statements of at least 10 and maybe 11 of the other jurors that she has indicated to them that she is not simply required to follow the law.

I don't want to rehash the statements of all the jurors, but we had statements like, "The law is stupid. We don't have to follow it. The law is silly. We don't have to follow it."

Take your pick. When I would ask her these questions, upon examination, she would say, "I didn't say it like that, or that wasn't quite what I said. I didn't use that term," and then she tried to explain how she combined the law and the facts, and then we talked about reality, and you all know what the testimony was in that regard.

We didn't ask for this problem. This problem was thrust upon us by a note from Mr. Gooden which improvidently advised us of the situation. I say improvidently because it was not the note, although it was counter-signed by the foreperson.

It was not a note in which all of the jurors agreed or combined. At least not at the time. Nonetheless, we have had the problem. We've reviewed the cases. We have discussed this adnauseam [sic].

[9080] Everyone has had an ample chance to address the problem, and I think under Rule 23, a clear case of cause has been shown of a juror who—and let's not belabor the question of deliberating or not deliberating.

Some of the jurors say, in fact, she has simply not deliberated. She has not shared. It is not a combining of arguments and experiences. She denied that, and we will accept what she says.

The important thing is that she has apparently made up her mind that she can do pretty much what she feels like doing regardless of what the law is.

Now, that it has been brought to our attention, we simply cannot ignore it. I must say that I was in some doubt until yesterday afternoon when we had arguments on the point and someone said, quite properly, "Well, how do you know she didn't change her mind after your instruction?" Because she has not said anything about that one way or the other since the instruction.

She has not said she would. She has not said she wouldn't. She said she really didn't differentiate between before and after, and I think Mr. Pearson made the point that was probably the most telling, and that is that I instructed the jury on Thursday afternoon about what to do and what the effect of not following the law would be.

Her reactions were as follows: And I say this: [9081] It is repetitious, only for the record, in the event that this has to be examined.

One is that she was angry; that she assumed that it was directed towards her. I am not even sure I looked at her during the giving of the instructions. I really thought it was someone else.

Most telling, I suppose, was what happened Monday morning before any deliberation. Without consulting with the other jurors, she sends us a note that the jury is deadlocked, which I suppose is an answer to the question of whether or not she was going to follow the law.

Interpreted, the answer is a clear, no, although she did not ask to be excused.

I make a finding of fact at this time that this young lady should be removed for just cause, and I plan on doing so. I note the objections of all counsel to my actions, and the record is clear on your positions.

The record is clear on my position. We are going to proceed.

[9103] (Juror Grant entered the courtroom)

EXAMINATION BY THE COURT:

Q. First, how are you feeling? Are you feeling all right?

A. Yes. Fine.

Q. I didn't get a note from you, but I hear that you are still not feeling too well about what is happening?

A. The only thing is that I came back to get it over with. You know, I don't feel that I should be beat up on and people talking to me in all kinds of manner and being sarcastic.

I don't think I need to go through that, you know. I have been here 3 months, just like everybody else, and I am a human being. I told them that. They are not going to jump on me and beat up on me.

Q. I quite agree with you. Nobody should.

A. And if I am not going the way they want me to go, then excuse me and get somebody who will go their way and agree.

Q. What they want or don't want as far as you are concerned is unimportant. You are doing a very important piece of work as a juror on this case. You understand that.

A. Yes, and I take it very seriously.

Q. I am sure you do, and we appreciate that. You are as important on that jury as anyone else. Do you understand [9104] that?

A. Yes, sir.

Q. I can't just excuse you because you want to be excused.

A. I don't want to be excused, Your Honor.

Q. What is that noise? I guess it is the phone system. We have got a couple of lawyers on the phone, as well. Somebody was scratching something.

In any event, I want to assure you how important you are in this process. Regardless of what your ideas are on this case or how you think it ought to come out, you are as important as anyone else on this jury, and I say that not just to convince you to stay, but also to let you know that the system depends on people like you.

People who have perhaps different ideas than other people, there is nothing wrong with that, but we need a full jury to decide this case.

As you point out now, we have been at it now almost 3 months, and you are a strong person, I am sure.

A. Yes, sir.

Q. Now, tell me exactly. Has anybody been physically abusive to you?

A. Oh, no. Like touch me in a manner?

Q. Yes, or anything.

A. No.

Q. Has anybody referred to your race?

[9105] A. No.

Q. Nothing like that?

A. No, no, no, no. It is just like sometimes people say, "You are not using your common sense,["] you know, or, "Do you understand the stuff?"

And like I say, "What are you insinuating? What do you mean do I understand?"

You know, it is like somebody wants to carry through torture; wear you down; whatever. I don't feel that I should be tortured.

Q. No, I understand. The jury process is a difficult process, particularly when it lasts a long time, and people disagree. People yell at each other. People criticize each other, but you have just got to be tough.

A. I am tough.

Q. I am sure you are tough, but if you believe in a position, if you honestly believe in a position, and if others honestly believe in a different position, then you are going to argue about it.

That's this jury process, to consider each other's positions; to think about them. And if after you have thought about them and you still don't agree with them, then you simply say to them, "I don't agree. I am going to stick with my guns right where I am." Do you understand?

A. Can I ask you a question?

[9106] Q. Indeed, you may.

A. How long do you have to say there and disagree?

Q. That's up to me.

A. That's up to you?

Q. That's up to me. But let me assure you that I will not let you stay so long that it becomes physically or mentally oppressive beyond a certain point.

You see, at some point, at some point, if you cannot agree, if the jury simply cannot agree on any of the counts, at some

point the foreperson must send me a note and say, "We cannot agree," and then it is up to me to take some action however I think it should come out. Do you understand?

Now, I want to ask you to do your very best, and I hope that you are willing to continue. All right?

A. Yes, sir.

Q. Good for you. Just be tough. Don't be thin skinned.

A. I am not thin skinned, but it just is—you know, there is a limit. There is time you know, you need to stop because, see, I have a temper, too.

Q. Of course.

A. And I don't want to get in trouble.

Q. Well, you are not going to get in any trouble. I just want to make sure that nobody is abusing you.

A. I don't think they would even try that.

[9107] Q. I don't think so, either, but we wanted to make sure about that.

You just go back in there and do your job as you see it. Consider the positions of everybody. Change your mind if you want to, but if you don't want to, don't change your mind. Do you understand?

Do whatever you think is right under the law and the evidence. I am going to bring the entire jury back in in just a moment and talk to them about consideration of each other.

That hopefully will help a little bit. All right. All right. Thank you so much.

MR. MORAN: Your Honor, before you excuse her, I would like to approach the bench and suggest some questions that I would like to ask this juror.

MR. PEARSON: I oppose any further questions.

THE COURT: I think we have covered the subject.

MR. MORAN: I don't believe we have even scratched the surface, Your Honor.

THE COURT: All right. Well, I disagree with you. Thank you, anyway. Just have a seat, please.

All right. Thank you, ma'am. If you would go back and join the jury. I am going to get the jury back up here in just a moment. I do appreciate your consideration.

Ms. Grant, if you want to give that microphone [9108] back. Then I want the entire jury brought back down.

THE CLERK: Can Ms. Grant stay in the lobby while I get the other jurors?

THE COURT: Oh, yes, sure.

(Juror Grant was excused from the courtroom)

[9117] (Jury present at quarter to 11:00 a.m.).

THE COURT: Sit down, please, folks. Good [9118] morning, folks.

I want to begin by thanking you for the efforts that you are making in what appears to be a difficult case and a difficult situation, and I think and hope that you will accept and follow the instructions that I am about to give you.

First, I want to say one or two things generally about deliberations, and perhaps I should have said them to you earlier.

It is so important when you are discussing a matter as serious as this matter that you be considerate of one another; that you listen carefully to each other. And if you disagree with them, respect their right to disagree with you.

This is the way you would treat your family. This is the way you would treat your friends. This is the way you would treat each other. Exchanging ideas, differing in opinions is what goes on in the jury room, but it is not productive of any good for you to lean on one another in a way that is offensive to each other.

I think you all can understand that. It is not productive of any good to diminish each other by suggesting that perhaps they don't understand or that they are not thinking as clearly as you are. They may or may not be.

They may be thinking more clearly than you are. [9119] We don't know. The important thing is that you be considerate of each other.

Recognize the right that people, particularly on a jury, have the right to disagree, and ultimately continue to disagree if that's what they honestly feel.

A jury is not required to return a verdict. The length of time we have been in this case is important, but not determinative of anything.

Whether it is a day case or a 6 months case, it still applies that if a person firmly has an opinion as to what he or she thinks is right, and if that happens to cause a mistrial, so be it.

The important thing is that you of you [sic] does what you think is correct under the law and the evidence in the case, and that you respect each other's opinions. And if you cannot change those opinions by logical, considerate persuasion, then don't go any further.

I ask that none of you be abusive to one another, and I hope you haven't been, but I did feel that I should say this to you because it is so important in the jury process, and so much for that.

I have excused Ms. Alfonso, not because she is not a nice person or did anything wrong. It is just that, to be perfectly honest about it, there were certain things about her views of the jury process and also her own [9120] feelings, I might say that she was quite willing at the end to, I won't say agree with what I do, but certainly did not take it badly.

She in a way I guess was kind of relieved, but I felt that under the circumstances that I had to cause to dismiss her, not

because I didn't think, as I say, I didn't think she was not a nice person.

It is just because I think in her view of what the law is or isn't, she just was unable to serve as a juror on this case.

I want you to understand that that should have no bearing on what you do or think. And even more importantly, I don't want you to think that it is indicative of anything I may think about this case.

It is not my function to communicate to you any disposition about this case whatsoever or in any direction. So my excusal of Ms. Alfonso has absolutely nothing to do with how I may view this case and how it should come out. It has absolutely nothing to do with it. Please understand that.

So that is a part of this case you should from this point on simply disregard and go about your business, as I am sure you all will in a workman like way.

Now, I want to re-read one or two instructions to you. I hate to labor you with these, but I think they are [9121] important.

Again, I say to you all that in the trial of this cause, the judge and the jury have separate functions. I preside over the trial to rule on questions of law so that proper and relevant evidence will be presented and to instruct you, the jury, on the law that's applicable to this case.

Indeed, the functions of all in the courtroom are probably clear. The Court, the independent judiciary, is here to make sure that all the parties get a fair trial, and that the trial is conducted in accordance with established law and rules; and as previously stated, to see that the jury is instructed on the law that's applicable to this case.

Counsel for the government and the defense are charged with the responsibility of representing their clients. You as jurors are judges of the facts, but in determining what actually

happened in this case, that is in reaching your decision as to the facts, it is your sworn duty to follow the law I am now in the process of defining for you, and you must follow all of my instructions as a whole.

You have no right to disregard or give special attention to any one instruction, or question wisdom or correctness of any rule I may state to you. That is, you [9122] must not substitute or follow your own notion or opinion as to what the law is or ought to be.

It is your duty to apply the law as I give it to you, regardless of the consequences. By the same token, it is also your duty to base your verdict solely upon the testimony and evidence in the case, without fear, prejudice or sympathy.

That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have a right to expect nothing less.

The evidence should be considered and viewed by the jurors in the light of your own observations and experiences. If during the trial, or at any time after the trial you feel that I have intimated any opinion as to the facts, and I have not intended to do so at any time, the jury shall entirely disregard such intimation, since the jurors alone are the sole and exclusive judges of the facts.

Just two more instructions that I want to bring to your attention, and they are important, and perhaps you have all these with you. You can look at them all, of course.

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, a defendant is presumed by the law to be innocent. The law does not [9123] require a defendant to prove his innocence or to produce any evidence at all, and no inference whatever may be drawn from the election of a defendant not to testify.

The government has the burden of proving a defendant guilty of every element beyond a reasonable doubt. And if it fails to do so, you must acquit the defendant.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt.

It is only required that the government's proof exclude any reasonable doubt concerning the defendant's guilt.

A reasonable doubt is a real doubt based upon reason and common sense, after careful and impartial consideration of all of the evidence in the case.

Such a doubt may arise from the evidence from a conflict in the evidence or from a lack of evidence. A reasonable doubt does not arise from mere guesswork, speculation or whim, nor does it arise from a reluctance to convict through a feeling of mercy or sympathy.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

[9124] Such proof requires each juror to have a settled, fixed and abiding conviction of that guilt. If you are convinced that the government has proven a defendant guilty beyond a reasonable doubt, find him guilty.

If you are not convinced that the government has proved a defendant guilty beyond a reasonable doubt, find him not guilty.

And, lastly, in arriving at a verdict, folks, each of you must make up your own mind after careful and consideration of all of the evidence as it is recalled by each of you.

That consideration should include the opinions of your fellow jurors as well as your own. It is the essence of the jury

system that you will listen to the views of one another, and that you will do so with open minds and with a disposition to accept the views of the others, if the reasons advanced are persuasive, based on the evidence and not contrary to the Court's instructions on the law.

Any juror who, after such consideration of all the evidence comes to a firm conclusion different from the others, should not change that conclusion merely for the sake of conformity or unanimity.

You should, however, listen to and consider with all the views of your fellow jurors so that, if possible, you may arrive at a unanimous verdict.

[9125] In this court, in order to render a verdict in any case, all of the jurors must concur. That means each and everyone of you must agree, must concur in the verdicts that you return in this case.

Now, a last thought, ladies and gentlemen, and that is this:

How long should you deliberate if you cannot agree? Well, there is no specific answer to that. If at some point your foreperson, and you all agree that there is no longer any hope that no matter how long you stay there, things are not going to change, then Ms. Sebastian should advise me in writing.

Any communication that I receive from the jury should be through your foreperson rather than in direct reference to me, and that's true of all of you.

You may want to say something to me. Agree on it together. Stay together. If anyone of you has an idea, if anyone of you has a question as to the law, ask me. Don't be reluctant to ask questions. I will answer as many questions as you ask, if I can properly do so.

And if I cannot, I will tell you that I can't. I take questions up with the lawyers. We share them. They help me make the

answer. If I can answer it, I will, and it doesn't matter how many there are.

We are here to help you; to serve you in this [9126] process. If at some point you finally say that, "We just cannot do it," then please, Ms. Sebastian, you tell me. I will determine how long that will take.

I don't think you have reached that point yet. I may be wrong. If you have, tell me. If you haven't, continue. Be considerate of one another and let me know during the course of your deliberations what you need, and I will be happy to comply.

Are there any questions? All right. Fine. Now, what we are going to do is I am going to ask Mr. Lee to take you out. I am going to ask him to keep you here because we have some testimony that you asked be read to you ready to read to you, but I want to give the lawyers an opportunity to put on the record anything they wish to put on the record before we do that.

* * * *

[9131] JUROR SEBASTIAN: Your Honor, at this point I think we all agree that we don't need to hear the testimony of Mr. Hartman.

THE COURT: All right.

JUROR SEBASTIAN: That was a question of Ms. Alfonso.

THE COURT: Let me ask the entire jury. Does anyone want to hear the testimony of Mr. Hartman?

JUROR PERALTA: I do.

THE COURT: One is enough.

JUROR PERALTA: Oh, I am sorry.

[9132] THE COURT: No, that's perfectly all right. Again, I say this is the jury system.

JUROR SEBASTIAN: Right.

THE COURT: You all have the right to your opinions. You all have the right to ask through Ms. Sebastian a question, and I know that Ms. Sebastian—I don't have to direct her to, because she's the foreperson that's a responsible position, that you all elected her to, and I know that, for example, if one of you again at any time felt that you were being intimidated or abused in any way you would tell Ms. Sebastian and she would be required to tell me.

Do you understand that? I know Ms. Sebastian understands that. One point that was raised that I think I should mention to you is that—and we learned this during our several meetings over the past several days—don't worry about outside influences.

Don't talk to each other about what the press may or may not do. That's totally unimportant. It is totally unimportant to your deliberations. Whether or not the press is going to print it in one way or the other or what the press is going to say is unimportant as far as you are concerned. Do you follow me? Does everybody agree with that? Good.

Is there anything else that you would like to ask [9133] me before—I guess we don't need to let the jury retire now, do we? We will just go ahead and do the Hartman testimony.

MR. PEARSON: Yes, sir.

MR. MOFFITT: Your Honor, I think we need one more sidebar.

MR. PEARSON: Judge, there was another note that was submitted to Your Honor from I believe Ms. Cortes about a response in writing.

THE COURT: Yes. Would you like me to help you with that? Do you want me to contact somebody?

JUROR CORTES: Yes. I will write down the name.

THE COURT: I will be happy to do it.

* * * *

[9135] THE COURT: All right. One last item, folks, and then we will continue.

I want to make sure that particularly in light of the fact that I have excused one juror, that each of you can continue your deliberations fairly and impartially. I want to ask each one of you that question.

EXAMINATION BY THE COURT:

Q. Ms. Doll, can you?
A. Yes.
Q. And Mr. Rosso, can you?
A. Yes, sir.
Q. Mrs. Grant?
A. Yes.
Q. Can you?
A. Yes.
Q. Ms. Mandell, can you?
A. Yes.
[9136] Q. Mr. Gooden?
A. Yes, sir.
Q. Mr. McSwiggan?
A. Yes, Judge.
Q. Ms. Peralta?
A. Yes.
Q. Mr. Blanton?
A. Yes.
Q. Ms. Comes?
A. Yes.
Q. Mr. Butler?
A. Yes.
Q. And Ms. Sebastian?
A. Yes.

THE COURT: All right. I think we are ready to go ahead now and read the testimony of Mr. Hartman to you.

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No. 01-1618

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ABBELL AND WILLIAM MORAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 23(b) and the Sixth Amendment's guarantee of a verdict by an impartial, unanimous jury prohibit the discharge of a deliberating holdout juror through a process in which the court (i) questions all members of a jury about their deliberations, and (ii) makes credibility determinations and subjectively decides--based on a patently ambiguous record of those deliberations--that there is no "substantial possibility" that the juror is being discharged for her views about the merits of the Government's case.

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

This *amicus curiae* brief is submitted in support of the petition for a writ of certiorari filed by petitioners Michael Abbell and William Moran. The consents of the parties are submitted with the brief in accordance with Sup. Ct. R. 37.2(a).[1/]

INTEREST OF *AMICUS CURIAE*

The NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

The NACDL rarely participates as *amicus* at the petition stage. It does so in this case because the issue presented has transcendent importance, and because, in our judgment, the court of appeals' decision threatens to undermine the crucial protections of the Sixth Amendment right to trial by jury and to invite trial courts to invade the secrecy of jury deliberations. We believe that the perspective of our members, who regularly represent criminal defendants in federal and state trial courts, will be useful to the Court.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because the court of appeals' decision conflicts with decisions from other circuits and resolves, incorrectly and with little analysis, issues of extraordinary importance concerning a criminal defendant's Sixth Amendment right to trial by jury. Contrary to *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987), *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997), and *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999), the court of appeals' decision permits a district court to interrupt jury deliberations and conduct an intrusive investigation into allegations that a juror intends to nullify on the basis of an ambiguous complaint by other jurors. The decision significantly misstates the high evidentiary hurdle that *Brown* and *Thomas* have set before an allegedly nullifying juror may be removed from a deliberating jury. And the decision undermines even its watered-down version of the *Brown/Thomas* standard by affording almost complete deference to the trial court's removal decision. The Court should grant certiorari to address these issues.

I. THE *BROWN* AND *THOMAS* STANDARD FOR REMOVAL OF AN ALLEGEDLY NULLIFYING JUROR.

Courts uniformly recognize the *power* of the jury to nullify--to acquit in purposeful disregard of the law and the facts. *See, e.g., Horning* v. *District of Columbia*, 254 U.S. 135, 137-40 (1920); *United States* v. *Funches*, 135 F.3d 1405, 1408-09 (11th Cir. 1998). With equal uniformity, however, courts hold that jurors have no *right* to nullify. Thus, most courts refuse to instruct the jury on its nullification power or to permit defense counsel to argue explicitly for nullification. *See, e.g., Funches*, 135 F.3d at 1409. Because jurors have no right to nullify, courts have held that a juror's expressed determination to acquit regardless of the facts and the law constitutes "just cause" for removal under Fed. R. Crim. P. 23(b). *See, e.g., Thomas*, 116 F.3d at 617; *United States* v. *Geffrard*, 87 F.3d 448, 452 (11th Cir. 1996).

Although a trial court may remove a nullifying juror under Rule 23(b), courts generally are reluctant to investigate allegations made during deliberations that a juror intends to nullify. This reluctance arises from the intrusive (and often inconclusive) investigation that an inquiry into nullification entails. Such an investigation of a deliberating jury conflicts squarely with the principle--manifested, for example, in Fed. R. Evid. 606(b)--that jury deliberations must remain secret. Courts have recognized that "[o]nce a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618. "This conflict is especially pronounced . . . where the alleged misbehavior is a purposeful disregard of the law, a particularly difficult allegation to prove and one for which an effort to act in good faith may easily be mistaken." *Id.*

The Second Circuit declared in *Thomas* that "[t]he secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." *Id.* The assurance that juries deliberate in secret, immune from inquiry by the court or the parties, promotes free, open, and candid debate among the jurors. *See, e.g., Tanner* v. *United States*, 483 U.S. 107, 124 (1987) ("[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.") (quoting legislative history of Rule 606(b)). Indeed, a trial court may "invite[] reversible error" when it investigates "internal influence occurring during deliberations." *United States* v. *Prosperi*, 201 F.3d 1335, 1340-41 (11th Cir.) (citing Fed. R. Evid. 606(b)), *cert. denied*, 531 U.S. 956 (2000).

Judicial intrusion into deliberations presents two principal dangers. First, "if trial judges were permitted to inquire into the reasoning behind jurors' views of pending cases, 'it would invite trial judges to second-guess and influence the work of the jury.'" *Symington*, 195 F.3d at 1086 (quoting *Thomas*, 116 F.3d at 620). Second, "a trial judge's examination of juror deliberations risks exposing those deliberations to public scrutiny. Such exposure, in turn, would jeopardize the integrity of the deliberative process." *Id.*

The *Brown* and *Thomas* courts assigned such great weight to the value of secret deliberations that they adopted an evidentiary standard designed expressly to protect the sanctity of the jury room. Those courts held that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Thomas*, 116 F.3d at 621-22 (emphasis added); *see Brown*, 823 F.2d at 596 (same); *cf. Symington*, 195 F.3d at 1087 ("any reasonable possibility"). Under the "any possibility" standard, "[a] presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as

instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions." *Thomas*, 116 F.3d at 622.

As this language suggests, the *Brown/Thomas* standard serves two functions. First, it establishes an evidentiary threshold that must be crossed before the district court can investigate a claim of nullification; that is, the court may not undertake an inquiry as long as there is "any possibility" that a complaint about a juror stems from his view of the evidence. *See id.*; *see also Symington*, 195 F.3d at 1087 (when there is any reasonable possibility that the impetus for dismissal stems from the juror's views on the merits of the case, "the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial"). As *Thomas* observes, the "any possibility" standard "protects not only against the wrongful removal of jurors; it also serves to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations." 116 F.3d at 622. Second, *Brown* and *Thomas* establish a substantive rule for determining when a juror may be dismissed under Rule 23(b) for nullification; dismissal may occur only when there is no possibility that the complaints about a juror's conduct result from his position on the merits.

This case amply illustrates the dangers that the *Brown/Thomas* standard serves to prevent. After twenty hours of deliberations, on the basis of a note from two jurors (Gooden and Sebastian) to the effect that another juror (Alfonso) had made up her mind about the case and would not consider contrary evidence (R164-8525-26), the district court launched an investigation that ultimately consumed four days and entailed interviews (in some instances, multiple interviews) of all the jurors, in which they were asked probing questions about Juror Alfonso's statements and opinions. The district court's lengthy interrogation of Juror

Alfonso herself is particularly troubling (R165-8845-68); the court asked her repeatedly whether she would follow the law, apparently refusing to accept her insistence that she would, and even asked her at one point, "What is your concept of the word 'reality'"? R165-8862. Such an extraordinarily intrusive investigation inevitably "bring[s] to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded." *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926).

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH *BROWN*, *THOMAS*, AND *SYMINGTON*.

Although the Eleventh Circuit's decision pays lip service to *Brown* and *Thomas* (while ignoring *Symington* entirely), it undermines in three significant respects the procedural and substantive protections of the "any possibility" standard that those decisions adopt.

First, the court of appeals' opinion misstates the *Brown*/*Thomas* standard. The opinion concludes that "a juror should be excused [for nullification] only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *United States* v. *Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) (citing *Thomas*, 116 F.3d at 621-22, and *Brown*, 823 F.2d at 596). But that is not the standard *Brown* and *Thomas* adopt. As noted above, both cases hold that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Thomas*, 116 F.3d at 621-22; *Brown*, 823 F.2d at 596 (emphasis added). The phrase "substantial possibility" does not appear in *Thomas*, and it appears in *Brown* only as an assessment of the weight of the evidence in

that case. *See id.* ("The record evidence in this case indicates a substantial possibility that juror Spriggs requested to be discharged because he believed that the evidence offered at trial was inadequate to support a conviction.").[2/]

Second, the court of appeals largely ignores the point that, under *Brown* and *Thomas*, the district court may not initiate an investigation during deliberations on the basis of ambiguous evidence of nullification. The initial note that the court received from Jurors Gooden and Sebastian left open the possibility that their complaints about Juror Alfonso resulted from her view of the evidence. Under *Brown* and *Thomas*, therefore, that note did not permit the district court to undertake further investigation. The district court's questioning of Jurors Gooden and Sebastian after it had given an anti-nullification instruction and after the jurors had sent out notes concerning a possible deadlock was even more clearly unjustified under the "any possibility" standard. And the court's subsequent interrogation of all the jurors cannot possibly be sustained under the *Brown/Thomas* standard. At each of these critical points, the court should have rejected the government's

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[2/] The court of appeals asserts that *Brown* "used both the term 'any possibility' and the term 'substantial possibility'" and concludes that the terms are "interchangeable." *Abbell*, 271 F.3d at 1302 n.14. But *Brown* (as well as *Thomas*) used only the phrase "any possibility" in describing the proper evidentiary standard for excusal of an allegedly nullifying juror, and the addition of the modifier "substantial" plainly (and incorrectly) alters that standard. The Eleventh Circuit's newly-minted "substantial possibility" standard is significantly less strict than the Ninth Circuit's "any reasonable possibility" standard adopted in *Symington*; a possibility can be "reasonable" (that is, based on reason) without being "substantial."

request for a more intrusive investigation, because the "any possibility" standard had not been met.

The court of appeals sweeps this point aside in a footnote; it asserts that "[t]o find much fault with the inquiry in this case would unduly hinder a district court's ability to detect and rectify a juror's refusal to obey her duty in applying the law to the case and obeying the court's instructions." *Abbell*, 271 F.3d at 1304 n. 20. But the court overlooks the trial court's "equally, if not more, important [duty]--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618. And the court of appeals ignores the dangers that a nullification investigation presents. For example, if the trial court has the discretion to launch an inquiry into nullification during deliberations, "the threat of an interview with the judge could be used by those jurors who seek to convince a holdout to go along with the majority's position." Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 950 (1999). The possibility of such an interview also will chill deliberations; jurors--particularly those in the minority--will be reluctant to state their views for fear that the majority will report their words to the court as evidence of nullification. *See id.*

The court of appeals similarly fails to recognize that an inquiry by the court into the basis for a particular juror's views, no matter how delicate, inevitably will convey to the jury that the court disapproves of those views. The remaining jurors--who know that the juror under investigation favors acquittal--may well conclude that the court finds that position unreasonable. Such a conclusion would have a powerful impact on the jury, and particularly on any other holdout jurors favoring acquittal. In this case, for example, it is probably no coincidence that Juror Grant (who, with Juror Alfonso, had been a holdout for acquittal) changed her position following the court's inquiry and voted for conviction on two counts. The district court compounded the problem by instructing the jury that Juror Alfonso had been

dismissed because of her "views of the jury process" and "her own feelings." R168-9118-19; *see United States* v. *Hernandez*, 862 F.2d 17, 24 (2d Cir. 1988) (condemning instruction that criticized dismissed juror).

Third, the court of appeals' opinion undermines the substantive protections of the *Brown/Thomas* standard. The court compounds its error in adopting the wrong legal standard by affording almost complete deference to the district court's determination on that issue. *E.g.*, *Abbell*, 271 F.3d at 1302-03. Such deference conflicts with *Brown*, *Thomas*, and *Symington*. Those cases make clear that, although the court of appeals reviews the district court's removal decision for abuse of discretion, the "any possibility" standard marks the limit of that discretion. If the district court removes a juror accused of nullification where there is "any possibility" that the removal request results from the juror's view of the evidence, the court necessarily abuses its discretion. *See, e.g.*, *Symington*, 195 F.3d at 1085.

To ensure strict compliance with the "any possibility" standard, the *Brown*, *Thomas*, and *Symington* courts each conducted a thorough, independent review of the evidence to determine whether that standard had been satisfied. *See, e.g.*, *Symington*, 195 F.3d at 1088; *Thomas*, 116 F.3d at 623-24; *Brown*, 823 F.2d at 596-97. By contrast, the court of appeals in this case engaged in a cursory analysis aimed solely at determining whether the record contained some evidence--however sparse--to support the district court's removal decision. The court notes, for example, that "[s]ome jurors indicated that they were outraged by Alfonso's decision to do her nails during deliberations" and that "Juror Alfonso's own testimony on her commitment to following the law was not certain." *Abbell*, 271 F.3d at 1303. But the court ignores testimony by Jurors Grant (R167-8934-35) and Butler (R167-8976-87) that Juror Alfonso was following the law and considering the evidence (R166-8861, 8864), and it ignores Juror

Alfonso's insistence that her disagreements with the other jurors stemmed from the application of her common sense and life experiences to the testimony (*e.g.*, R166-8849, 8852-53, 8856-57). Had the Eleventh Circuit conducted the analysis that *Brown*, *Thomas*, and *Symington* require to ensure compliance with the "any possibility" standard, it would not have ignored this evidence, and it certainly would not have given decisive significance to Juror Alfonso's decision to do her nails or to the alleged lack of "certain[ty]" in her testimony about her willingness to follow the law.

Apart from creating a conflict with three other circuits, the court of appeals' excessive deference to the district court's removal decision represents unwise policy. The institutional pressure on trial judges to complete cases and move their dockets provides a powerful incentive for a court faced with an ambiguous record to conclude that a juror intends to nullify and thus to remove the juror. *See* Marder, *supra*, 93 Nw. U. L. Rev. at 951. In this case, for example, the district court referred several times to the time, effort, and money that the case had consumed. *E.g.*, R16-2181 at 24-25; R165-8633. When the issue concerning Juror Alfonso first surfaced, the court rejected defense counsel's objections to an investigation: "We have been at this for, excluding matters between trials and before trials, we have been at this for 8 months almost in trial. I totally disagree with the concept that we are at a point where we ought to do nothing. . . . I am going to do something." R164-8538-39. The court's desire "not . . . to let this case go down easily," R165-8633, undoubtedly affected its conclusion that Juror Alfonso should be excused. Moreover, in interviewing the jurors--and particularly the allegedly nullifying juror--"[t]here is a danger that the judge will be guided by his or her views of what the appropriate outcome of the case should be and may be more likely to dismiss a juror whose views do not accord with those of the judge." Marder, *supra*, 93 Nw. U. L. Rev. at 949-50. For these reasons, and to ensure protection of the

defendant's constitutional and statutory right to a unanimous verdict, an appellate court should conduct an independent review of the record to determine whether the district court complied with the "any possibility" standard. The court of appeals failed to conduct that independent review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 01-1618

In the Supreme Court of the United States

MICHAEL ABBELL AND WILLIAM MORAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court complied with Rule 23(b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment, when it dismissed a juror on the ground that she refused to follow the law and the court's instructions during jury deliberations.

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In the Supreme Court of the United States

No. 01-1618

MICHAEL ABBELL AND WILLIAM MORAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 271 F.3d 1286.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2001. A petition for rehearing was denied on February 5, 2002 (Pet. App. 60a-62a). The petition for a writ of certiorari was filed on May 1, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of a racketeering conspiracy, in viola-

tion of 18 U.S.C. 1962(d); and money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). After trial, the district court denied petitioners' motion for a new trial, but granted their motion for a judgment of acquittal on the racketeering conspiracy count. Pet. App. 30a-59a. Petitioner Abbell was sentenced to 87 months' imprisonment; petitioner Moran was sentenced to 60 months' imprisonment. *Id.* at 3a. The court of appeals affirmed petitioners' money laundering convictions and the district court's denial of their new trial motion, reversed the judgment of acquittal on the racketeering conspiracy count, and remanded for resentencing. *Id.* at 1a-2a.

1. During the 1980s and 1990s, Miguel Rodriguez-Orejuela was a leader of the Cali Cartel, a criminal enterprise that smuggled large quantities of cocaine into the United States. Pet. App. 4a. Rodriguez and the other Cartel leaders enforced a strict code of silence among their employees to protect the Cartel's ongoing operations. *Ibid.* The Cartel paid the attorney's fees for employees and expenses for their families. *Ibid.* It threatened arrested employees and their families with injury or death if they cooperated with the authorities. *Ibid.* And it obtained affidavits or depositions from arrested employees stating that they did not know or were not involved with Rodriguez. *Ibid.*

Petitioners Abbell and Moran were attorneys who worked for Rodriguez. Abbell directed the false deposition scheme, targeting those employees likely to provide false exculpatory evidence and warning against deposing employees who might inculpate the Cartel's leaders. Pet. App. 21a-22a. Abbell knew that the employees he targeted would have to lie to answer the questions in a manner that would benefit Rodriguez. *Id.* at 22a. Petitioner Moran was also involved in obtaining false affidavits from members of the Cartel who

were arrested importing drugs. *Id.* at 20a. Both Abbell and Moran received large sums of money from Rodriguez. *Id.* at 18a. They also both provided a large quantity of that money to Cartel employees and their wives. *Ibid.*

2. After a five-month trial, the jury acquitted petitioners on a substantive racketeering count, but hung on the remaining counts. Pet. App. 37a. Petitioners were then tried again. *Ibid.* On Monday, July 6, 1998, jury deliberations began. *Ibid.* On Thursday morning, July 9, the court received a note presented by Juror Gooden and signed by Foreperson Sebastian that alleged that a juror—later identified as Juror Alfonso—had formed an opinion about the case "prior to, in spite of and irregardless [sic] of the evidence," and was not reviewing, reading, or viewing the exhibits. *Id.* at 67a. In chambers and in the presence of petitioners and their counsel, the court interrogated Sebastian about the note after telling her not to disclose the substance of the jury's deliberations. *Ibid.* Sebastian said that Alfonso had not deliberated at all, *id.* at 69a, that she said that "I made up my mind the minute I walked out of the box," and that earlier that morning she had said that the racketeering conspiracy count was "a stupid law, and we don't have to regard it," *id.* at 69a, 72a. The court directed Sebastian not to discuss the meeting with the other jurors. *Id.* at 72a. The district court summoned the jury to the courtroom and gave a supplemental instruction that it had a duty to apply the law and that jury nullification was illegal. *Id.* at 73a-77a.

On July 13, Alfonso sent a note to the court stating that the jury was deadlocked. Pet. App. 77a. Ten jurors sent a note stating that they disagreed with Alfonso's note. *Id.* at 79a. The court interrogated

Sebastian, who said that Alfonso had not deliberated in the case. *Id.* at 80a-81a. Sebastian also stated that, since the court's supplemental instruction, Alfonso had not expressly stated that she would not follow the law. *Id.* at 82a-83a.

The district court then interviewed Juror Gooden, who confirmed that, before deliberations began, Alfonso had indicated that she had made up her mind. Pet. App. 86a. Gooden also stated that, before the court's supplemental instruction, Alfonso had referred to the court's instructions as a "guide," not the law. *Ibid.* The court once again interrogated Sebastian, who said that Alfonso had not deliberated for the past four or five days, and was either sitting or doing her nails. *Id.* at 90a.

The district court then interviewed the remaining jurors. Juror McSwiggan said that Alfonso had initially refused to deliberate, Pet. App. 92a, that, before the supplemental instruction, she had said that she "doesn't care what the law is," *ibid*, and that after the supplemental instruction, she had deliberated "somewhat," *ibid.*, but had not engaged in "meaningful" deliberation, *id.* at 93a. Juror Blanton said that Alfonso had not been deliberating, *id.* at 94a, that she had repeatedly said that "we didn't have to follow the instructions," *id.* at 95a, and that after the supplemental instruction, she had "pretended" to deliberate "a few times," *id.* at 96a. Juror Doll said Alfonso had not been involved in "meaningful deliberation," *id.* at 99a, and that she had said that she did not have to follow the court's instructions, *id.* at 98a. Doll also stated that Alfonso had discussed the evidence somewhat, but had not followed the rules. *Id.* at 99a. That morning, Doll stated, Alfonso had listened, but had not participated in discussions. *Ibid.*

The court interviewed Juror Alfonso, who said that a juror had attempted to pressure her regarding her vote, and that other jurors had accused her of disregarding the court's instructions. Pet. App. 102a. Asked whether she had said that she did not have to follow the law, Alfonso replied, "[m]aybe not exactly." but "Like this is not everything. This is not everything that we have to take into consideration." *Id.* at 103a. Alfonso denied having made up her mind before entering the jury room, and she stated that she had been deliberating. *Id.* at 104a-105a. But Alfonso admitted that, "[m]aybe I have a problem with the federal law." *Id.* at 105a. Alfonso explained that "[m]aybe I have problems due to the fact that I been so many years with the criminal law, and I say this doesn't make sense this, you know, but also on the other hand it is not only like you say." *Ibid.* When asked again whether she had told other jurors that she did not have to follow the law, she stated that she had said "I don't have to follow only the law. I have to use my common sense." *Id.* at 108a.

Juror Grant said that all of the jurors had been deliberating, Pet. App. 117a, and no juror had said that you do not have to follow the law in that manner, *id.* at 118a. Juror Mandell said that Alfonso stated that she "couldn't go by the way this law was written," *id.* at 121a, that after she was told she had to follow the law, she was giving the law "lip service," *ibid.* Juror Rosso said that Alfonso had said that the instructions were from the judge but "[t]his is not the law." *Id.* at 126a-128a. In Rosso's opinion, Alfonso had not been deliberating. *Id.* at 128a-129a. Juror Peralta said that Alfonso had deliberated some days, but not others, *id.* at 131a, that Alfonso had said that jury instructions were like travel instructions, *id.* at 132a, and that after the supplemental instructions, Alfonso had become

pretty nonverbal, *id.* at 133a. Juror Cortes said that Alfonso had participated in deliberations "once or twice," *id.* at 137a, that she had said that the court's instructions were like travel instructions, *id.* at 140a, and that she had not discussed the evidence in the past few days, *id.* at 141a. Juror Butler said that Alfonso said that she did not need to follow the law to come to a reasonable verdict, *id.* at 143a, and that she had worked in law enforcement and certain laws do not apply. *Ibid.* Butler also stated that, following the supplemental instructions, Alfonso said that she would follow the law, *id.* at 145a, and that she was currently deliberating, *id.* at 146a.

After concluding its interviews with the jurors, the district court concluded that Alfonso "simply was not answering my questions about her ability to follow the law or her willingness to do so." Pet. App. 154a. The court described her responses as "evasive," and noted that "she really does not contradict in substance the statements of at least 10 or maybe 11 of the other jurors that she has indicated to them that she is not simply required to follow the law." *Ibid.* The court emphasized that Alfonso "has apparently made up her mind that she can do pretty much what she feels like doing regardless of what the law is." *Id.* at 155a. The court also found that Alfonso had done nothing to indicate that she had changed her approach following the court's supplemental instructions. *Id.* at 155a-156a.

Meanwhile, Juror Grant sent the court a note stating, "I quit." Pet. App. 151a. In response to the court's questioning, Grant said that she wrote the note because she had been "mistreated" by some of the other jurors. *Ibid.* Grant agreed to "go home and get a good night's rest." *Ibid.* The court asked Sebastian about Grant's distress. Sebastian explained that no one had mis-

treated Grant, but that some jurors were "zealous" in trying to explain the deliberation process. *Id.* at 152a. The next day, Juror Grant told the court that she wanted to continue to serve as a juror. *Id.* at 157a. The court then dismissed Alfonso for cause and informed the jury of its decision. *Id.* at 156a, 161a-162a.

After their convictions, petitioners moved for a new trial on the ground that the court had erred in excusing Alfonso for cause. The district court denied the motion. Pet. App. 36a-59a. The court stated that Alfonso's dismissal was appropriate for three reasons: (1) she had said that the racketeering statute was a "stupid law," (2) she had said that she did not intend to follow the court's instructions, and (3) she had attempted to use her position as a corrections officer to influence the jury. *Id.* at 54a. The court found that there was not a "'substantial possibility' that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to RICO conspiracy." *Id.* at 55a.

3. The court of appeals affirmed. Pet. App. 1a-29a. The court rejected petitioners' argument that the district court had erred in excusing Alfonso from further jury service. *Id.* at 24a-28a. The court stated that because of the danger that a dissenting juror might be mistakenly accused of jury nullification, a juror should be excused "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." *Id.* at 25a (citation omitted). The court equated that standard with the "reasonable doubt" standard. *Ibid.* The court also ruled that the question whether a juror was purposefully not following the law is a question of fact that is reviewed for clear error. *Ibid.*

Applying those principles, the court noted that all of the jurors had agreed that early in deliberations, Alfonso had made comments that she did not have to follow the law and that the district court's instructions were advisory only. Pet. App. 27a. The court further observed that while Alfonso made no more direct statements on the issue following the court's supplemental instructions, the majority of the jurors agreed that she did not deliberate, would not consider evidence, and did not discuss the law. *Ibid.* The court also concluded that the district court acted within its discretion in finding, based on Alfonso's own testimony, that she did not intend to follow the law. *Id.* at 28a. Based on those considerations, the court of appeals concluded that "[t]his record shows that the district court's determination that Juror Alfonso was not basing her decision on the sufficiency of the evidence was not clearly erroneous, even in the light of a beyond a reasonable doubt standard." *Ibid.*

The court of appeals also rejected petitioners' contention that the district court's inquiry tainted the jury pool. Pet. App. 27a-28a n.20. The court explained that the district court had acted with "extreme caution" to protect the integrity of the jury process, and had instructed the jury after Alfonso's dismissal that her dismissal should not affect their deliberations. *Ibid.* The court of appeals cautioned district courts to err "on the side of too little inquiry as opposed to too much." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 14-30) that the court of appeals' decision upholding the district court's dismissal of Juror Alfonso for just cause under Federal Rule of Criminal Procedure 23(b) conflicts with the decisions of

other courts of appeals. Petitioners are incorrect. The court of appeals adopted the same substantive standard endorsed by those courts and, like those courts, cautioned district courts not to conduct an intrusive inquiry into allegations of jury misconduct during deliberations. The court of appeals' application of those standards to this case is a fact-bound ruling that merits no further review.

1. Federal Rule of Criminal Procedure 23(b) authorizes a district court to excuse a juror "for any just cause" after the jury has retired to consider its verdict, and to accept a verdict returned by the remaining 11 jurors. As the court of appeals in this case held (Pet. App. 24a), a juror's unwillingness to follow the law or the court's instructions constitutes "just cause" for dismissal. *United States* v. *Thomas*, 116 F.3d 606, 617 (2d Cir. 1997); *United States* v. *Geffrard*, 87 F.3d 448, 450-452 (11th Cir.), cert. denied, 519 U.S. 985 (1996). On the other hand, a juror may not be dismissed based on the juror's doubts about the sufficiency of the evidence. A discharge for that reason would not only fail to satisfy the "just cause" standard; it would also subvert a defendant's right to a unanimous verdict. To protect against dismissals based on a juror's view of the evidence and to safeguard jury deliberations, some courts of appeals have adopted a heightened standard for a dismissal based on a juror's alleged misconduct during deliberations. *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999); *Thomas*, 116 F.3d at 621-622; *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987).

The court of appeals in this case adopted such a heightened standard. It held that a juror should be excused "only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the

evidence." Pet. App. 25a (citation omitted). The court defined "substantial possibility," as a "tangible possibility," as opposed to a "speculative hope." *Id.* at 25a n.14. The court also equated its "substantial possibility" standard with a "beyond reasonable doubt" standard. *Id.* at 25a.

Applying that stringent standard, the court of appeals affirmed the district court's dismissal of Juror Alfonso. The court first noted that the district court had applied the correct legal standard. Specifically, the district court expressly found that "the record does not reveal a 'substantial possibility' that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to the RICO conspiracy." Pet. App. 26a-27a. The court of appeals further determined that the record supported the district court's determination. *Id.* at 27a-28a. In particular, all jurors agreed that Alfonso had stated that she did not have to follow the law, most jurors agreed that Alfonso would not engage in deliberations even after the district court instructed the jury on its duty to follow the law, and the district court was entitled to find, based on its assessment of Juror Alfonso's testimony, that she did not intend to follow the court's instructions or the law. *Ibid.* Based on those considerations, the court of appeals concluded that the "record shows that the district court's determination that Juror Alfonso was not basing her decision on the sufficiency of the evidence was not clearly erroneous, even in the light of a beyond a reasonable doubt standard." *Id.* at 28a. That fact-bound determination does not warrant review.

2. a. Petitioners contend (Pet. 14-21) that the court of appeals' "substantial possibility" standard is less stringent than the standards adopted by the courts of

appeals in *Symington*, *Thomas*, and *Brown*. In formulating its dismissal standard, however, the court of appeals expressly relied on the decisions in *Thomas* and *Brown*. Pet. App. 25a. That reliance was appropriate. Although the courts in *Thomas*, 116 F.3d at 621-622 and *Brown*, 823 F.2d at 596, used the phrase "any possibility," those courts undoubtedly meant a "substantial" possibility, not a speculative one. Indeed, the court in *Brown* used the term "substantial possibility" interchangeably with the phrase "any possibility." *Ibid.* Any other interpretation of those decisions would suggest that those courts intended to prohibit dismissals in all cases, since it is always possible to speculate that a juror's position is based on the insufficiency of the government's evidence. *Symington*, 195 F.3d at 1087 n.5.

Nor is there any conflict between the decision below and *Symington*. In that case, the Ninth Circuit held that "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." 195 F.3d at 1087. A "substantial" possibility means the same thing as a "reasonable" possibility, and the court of appeals in this case equated the two. See Pet. App. 25a (equating "substantial possibility" standard with the "reasonable doubt" standard); *id.* at 28a (same). The court of appeals' statement of the governing legal standard is therefore fully consistent with the standard articulated by the other circuits.

b. Petitioners err in contending (Pet. 20) that *Symington*, *Thomas*, and *Brown* preclude a district court from making credibility judgments in deciding whether there is a substantial possibility that a juror's position is based on the sufficiency of the evidence. In those cases, the courts held that the record showed that there

was a substantial possibility that dismissal was sought based on the juror's doubts about the sufficiency of the evidence. *Symington*, 195 F.3d at 1088; *Thomas*, 116 F.3d at 624; *Brown*, 823 F.2d at 596. None of those cases addressed whether a district court may make credibility judgments in applying that standard.

Other court of appeals decisions have made clear that district courts may resolve credibility issues. For example, in *United States* v. *Baker*, 262 F.3d 124, 130-131 (2001), the Second Circuit deferred to a district court's factual finding that a juror refused to participate in deliberations. The court explained that deference is warranted because the district court is in a unique position to hear and observe the testimony of the witnesses. *Ibid.* Similarly, in *United States* v. *Barone*, 114 F.3d 1284, 1307-1309, cert. denied, 522 U.S. 1021 (1997), the First Circuit affirmed a district court's dismissal for cause based on a finding that a juror was influenced by extra-record evidence. The First Circuit specifically upheld the district court's authority to reject the juror's testimony as not worthy of belief. *Id.* at 1307.

Petitioners suggest (Pet. 20) that, under *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), a district court does not have authority to make credibility determinations after an investigation into juror misconduct during deliberations. But *Reeves* holds only that, when a district court is evaluating a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, it must draw all inferences in favor of the nonmoving party and may not make credibility judgments. 530 U.S. at 150. The Court explained that such judgments are entrusted to the jury as the finder of fact. *Ibid.* *Reeves* is inapplicable to a district court's inquiry into jury misconduct during

deliberations, because in that setting, the district court is the ultimate fact-finder. A decision regarding jury misconduct obviously is not entrusted to the jury itself.

c. Petitioners similarly err in contending (Pet. 20) that *Symington*, *Thomas*, and *Brown* preclude the questioning of jurors to decide whether removal is appropriate. None of those cases erects a per se rule against such inquiries. Moreover, in none of those cases did the court of appeals hold that the district court erred in questioning jurors to determine whether dismissal was warranted. Rather, as discussed above, those courts reversed convictions based on their determinations that the evidence compiled as a result of the district court's questioning showed that there was a reasonable possibility that the request for dismissal was based on the juror's view of the evidence. *Symington*, 195 F.3d at 1088; *Thomas*, 116 F.3d at 624; *Brown*, 823 F.2d at 596. Those courts also did not suggest that an error in questioning jurors would itself be grounds for reversal of a conviction, absent evidence of prejudice to the defense.

The courts in *Symington*, *Thomas*, and *Brown* did warn about the dangers of intrusive jury questioning. *Symington*, 195 F.3d at 1086; *Thomas*, 116 F.3d at 619; *Brown*, 823 F.2d at 596. But the court of appeals in this case expressed the same concern. The court of appeals approved the district court's inquiry based on a determination that the district court had "proceeded with extreme caution to protect the integrity of the jury process." Pet. App. 27a-28a & n.20. In addition, the court of appeals cautioned district courts in the future to err on the side of too little inquiry instead of too much. *Ibid.*

Furthermore, the record supports the court of appeals' conclusion that the district court proceeded with

due caution. The district court interviewed *all* jurors only after (1) the court received a report from the jury foreperson that Alfonso had made up her mind about the case and had announced that she did not intend to follow the law, (2) the court instructed the jury that it must follow the law, and (3) the foreperson again informed the court that Alfonso was refusing to participate in deliberations. The district court conducted its interviews in chambers in the presence of petitioners and counsel. Before each interview, the district court told each juror not to divulge his or her views about the merits of the case or the state of deliberations (Pet. App. 67a, 79a, 84a-85a, 90a, 91a, 94a, 97a, 117a, 120a, 126a, 131a, 136a, 142a). Instead, the court's questions focused on whether a juror had stated that she did not intend to follow the law, and whether a juror had refused to participate in deliberations.

Other courts have upheld dismissals under Rule 23(b) after similarly limited questioning. See *Baker*, 262 F.3d at 130-132; *Barone*, 114 F.3d at 1307; see also *United States* v. *Reed*, 167 F.3d 984, 991 (6th Cir.), cert. denied, 528 U.S. 897 (1999). Whatever the outer boundaries of appropriate questioning, they were not exceeded here.

3. Finally, petitioners' reliance (Pet. 21-26) on *Tanner* v. *United States*, 483 U.S. 107 (1987), and *Brasfield* v. *United States*, 272 U.S. 448 (1926), is misplaced. In *Tanner*, the Court held that under Federal Rule of Evidence 606(b), a district court properly rejected a defendant's post-verdict motion for an evidentiary hearing to determine whether jurors had been drinking and using drugs during trial. By its terms, Rule 606(b) applies only to "an inquiry into the validity of a verdict or indictment." It does not apply to a pre-verdict judicial inquiry into juror misconduct during deliberations. In *Brasfield*, the Court held that a trial court erred in

asking a deadlocked jury for its numerical division. The district court in this case specifically advised the jurors not to inform it of the jury's division.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MICHAEL ABBELL AND WILLIAM MORAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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RULE

Fed. R. Crim. P. 23(b) 1

REPLY BRIEF

In the petition, we showed that the Eleventh Circuit's decision – approving the district court's invasive probe of the jury's deliberations and subjective evaluation of patently conflicting evidence, and affirming its dismissal of a juror for "just cause," Fed. R. Crim. P. 23(b) – conflicts with decisions of the Second, D.C., and Ninth Circuits and is wholly inconsistent with decisions of this Court. The government sees no conflict. That, however, is because it has closed its eyes to the holdings of the circuits in conflict and to the necessary implications of this Court's decisions mandating the preservation of the secrecy of jury deliberations.

1. **The Conflict Among The Courts Of Appeals.** Petitioner and the government agree that a juror's refusal to follow the law constitutes "just cause" for dismissal under Fed. R. Crim. P. 23(b), and that a juror may not be dismissed based on his or her doubts about the sufficiency of the government's evidence. Neither the parties nor the courts of appeals agree, however, about (i) the process used to investigate accusations of internal juror misconduct related to the merits of a case, or (ii) the standard by which such allegations should be assessed.

Here, the Eleventh Circuit approved the district court's interrogations of all 12 jurors about deliberations, some more than once, in assessing whether juror misconduct had occurred. It also affirmed the district court's subjective assessment of the record based on its credibility determinations about conflicting juror testimony. Finally, the court of appeals held that a juror may be excused "when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence," App. 25a, and concluded that the lower court's application of that test here was not clearly erroneous.[1]

---

[1] While the government's recitation of the underlying facts is incomplete, it does not take issue with petitioners' description of the facts. There is no dispute that Juror Alfonso's initial statement was that she did

At the outset of its brief, the government leaps over the fundamental foundational questions of whether a district court may interrogate jurors about deliberations and whether the test for assessing evidence of misconduct is subjective or objective. Instead, the government commences by defending the Eleventh Circuit's conclusion that the record evidence is sufficient to support the district court's decision that there was no "'substantial possibility' that Juror Alfonso's position was due to her belief that the evidence was insufficient to support a conviction as to the RICO conspiracy." App. 26a-27a (footnote omitted). This is not the correct standard, and it was clearly erroneous to reach such a conclusion based on the record in this case. See Pet. 6-8; App. 63a-168a; *infra* at 9. The critical point for determining whether to grant the petition for *certiorari*, however, is that the government is attempting to obscure the important legal questions presented by the petition – *viz.*, whether the district court lawfully can probe jury deliberations in this way and whether the standard for evaluating the evidence is subjective or objective.

a. The government's first response mischaracterizes petitioners' argument that the Second, D.C., and Ninth Circuits forbid district courts confronted with allegations of juror misconduct to interrogate jurors about the deliberations. Specifically, the government says that petitioners "err in contending that *Symington*, *Thomas*, and *Brown* preclude the questioning of jurors to decide whether removal is

---

not have to follow the law (not that she would not) and that following the judge's re-instruction of the jury, Juror Alfonso never again made any such statement. Nor does the government dispute that Juror Alfonso testified that she would follow the law and that a number of jurors testified that she was deliberating. Moreover, the statements of the individual jurors regarding Juror Alfonso, when viewed in their entirety, are far less clear than the government would have this Court believe. For example, Juror Blanton, leader of the faction of jurors pressuring others for conviction, Pet. 7-8, claimed that Juror Alfonso was not deliberating, but he also admitted that one morning she spoke to the other jurors for over an hour regarding her views of the case, *id.* at 6.

appropriate." Opp. 13 (citation omitted).[2] Of course, that is not petitioners' argument. Petitioners, like the Second Circuit, recognize and freely acknowledge that there are many situations in which a judge assessing whether there is "just cause" to dismiss a juror may question jurors during deliberations:

> Evidence of the nature and extent of a juror's unavailability, or incapacitation, for example, is ordinarily available without inquiring into the substance of deliberations. In such instances, the judge is free to conduct a thorough examination of the basis for removal – a basis that is itself unlikely to be confused with a juror's views of the sufficiency of the evidence – and to make appropriate findings of fact, including determinations of the credibility of the juror in question. [*United States* v. *Thomas*, 116 F.3d 606, 620 (2d Cir. 1997) (citations omitted).]

Similarly, "claims of partiality or bias often arise from some event, or from a relationship between a juror and a party, that is both easily identifiable and subject to investigation and findings without intrusion into the deliberative process." *Id.* at 621 (giving numerous examples).

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[2] *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997); *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987); *United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999).

In its recent decision in *United States* v. *Edwards*, 2002 WL 1967951 (5th Cir. Aug. 13, 2002), the Fifth Circuit in *dicta* appears to endorse the approach adopted by the *Thomas*, *Brown*, and *Symington* courts. Though there is some confusion in the language used by the *Edwards* court, it explains that the *Thomas-Brown-Symington* test prohibits any probing of juror deliberations, *id.* at *23-*24. Under this standard, the Fifth Circuit would not have allowed the juror interrogations that occurred here. (The Fifth Circuit did not apply the test in *Edwards*, because it affirmed the dismissal of the juror not for nullification, but rather for importing and exporting materials to and from the jury room and testifying falsely about it. *Id.* at *22-*24.)

The crucial point, however, is that "[w]here . . . as here, a presiding judge receives reports that a deliberating juror is intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations." *Id.* As the Second Circuit explained:

> There is no allegedly prejudicial event or relationship at issue, nor is the court being asked to assess whether a juror is so upset or otherwise distracted that he is unable to carry out his duties. Rather, to determine whether a juror is bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought processes. Such an investigation must be subject to strict limitations. [*Id.*]

After analysis of the competing interests, the Second Circuit adopted a heightened evidentiary standard for assessing whether a juror is refusing to follow the law and expressly held that its standard would "serve[] to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations," because "a presiding judge faced with anything but *unambiguous* evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal." *Id.* at 622 (emphasis supplied). The court concludes with language expressly forbidding precisely what occurred in this case:

> A lower evidentiary standard would encourage the court faced with ambiguous evidence of such impropriety to investigate further, eliciting testimony from jurors until enough evidence surfaced to affirm or reject allegations of juror nullification. One unavoidable consequence of imposing a lower evidentiary standard would thus be to open up the possibility that judges, in response to the demands of counsel or otherwise, would wind up taking sides in disputes between jurors on allegations of juror nullification – in effect, to permit judicial interference

> with, if not usurpation of, the fact-finding role of the jury. [*Id.* (emphasis supplied).]

The D.C. Circuit, too, has made clear that the type of juror probing authorized by the Eleventh Circuit violates Rule 23(b) and the Constitution. In *Thomas*, the Second Circuit relied on the D.C. Circuit's statement that "unless the initial request for dismissal [based on a juror's unwillingness to follow the law] is transparent, the court will likely prove unable to establish conclusively the reasons underlying it." *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). That is because the court may not "delve deeply into a juror's motivations" for fear of "intrud[ing] on the secrecy of the jury's deliberations." *Id.* See also *United States* v. *Symington*, 195 F.3d 1080, 1086 (9th Cir. 1999) (quoting *Brown*, 823 F.2d at 596).[3]

It is disingenuous to argue, as the government does, that the Second, D.C., and Ninth Circuits would allow the probe conducted in this case. The questioning authorized here was neither reasonable nor limited. Based on a note, the district court conducted a four-day investigation, interviewing all jurors about the statements, opinions, and conduct of jury members. The questioning addressed the substance and process of the deliberations and required jurors to reveal mental impressions and opinions related to the deliberations. As ambiguities about Juror Alfonso's statements and conduct developed in the record, the court expanded rather than halted

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[3] The government's other citations are inapt. *See United States* v. *Baker*, 262 F.3d 124, 131-32 (2d Cir. 2001) (dismissing juror based on her acknowledged decision on the merits prior to deliberations and refusal to participate in deliberations); *United States* v. *Reed*, 167 F.3d 984, 991 (6th Cir. 1999) (in a case not involving juror dismissal, holding that the district court's *Allen* charge was not coercive where the issue "focused solely on juror behavior and the ability of jurors [who were antagonistic] to deliberate impartially"); *United States* v. *Barone*, 114 F.3d 1284, 1305-07 (1st Cir. 1997) (dismissing juror who learned that the defense attorney had represented the juror's cousin).

its probe. The Eleventh Circuit's tepid, belated statement that lower courts should err on the side of too little inquiry instead of too much is meaningless in this context. Its decision plainly conflicts with those of the other courts of appeals.

b. The government also claims that that there is no conflict about whether the test for assessing a juror's alleged misconduct is objective or subjective and, specifically, about whether a district court may weigh credibility in making the misconduct determination. Again, the government is simply wishing away the analysis in the courts of appeals' decisions. In *Thomas*, the Second Circuit described the conflicting testimony from jurors about Juror No. 5. Without purporting to assess the relative credibility of the jurors or to weigh the conflicting evidence, the court held that it "cannot say that it is beyond doubt that Juror No. 5's position during deliberations was the result of his defiant unwillingness to apply the law, as opposed to his reservations about the sufficiency of the Government's case against the defendants." 116 F.3d at 624. Similarly, in *Brown*, the court did not weigh the juror's testimony, but simply noted that it "create[d] an ambiguous record," 823 F.2d at 597, and therefore that it had been error to dismiss him. Finally, in *Symington*, the court held that in light of the ambiguous record, the juror could not be discharged. 195 F.3d at 1092. In each case, once the court determined that the record was ambiguous, it held that the juror in question could not be discharged – a purely objective determination.

Neither case the government cites in support of the proposition that a district court may make credibility determinations in assessing internal juror misconduct applies here. In *United States* v. *Baker*, the juror was *not* removed for "refusal to base her vote on the evidence – a reason that is dangerously difficult to distinguish from a refusal to view the evidence as viewed by the other jurors – but rather for her refusal to engage in the process of jury deliberation." 262 F.3d 124, 132 (2d Cir. 2001). Thus, the court of appeals

affirmed the district court's finding that a juror refused to participate in deliberations based on the juror's "admi[ssion that] she had made up her mind before deliberations started, she refused to participate in the exchange of views with other jurors, and she said she would continue to refuse to participate." *Id.* *United States* v. *Barone* is even less relevant. There, the First Circuit affirmed the dismissal of a juror based not on his refusal to follow the law or any internal consideration, but rather based on a finding that he was influenced by extra-record evidence. 114 F.3d 1284, 1306-07 (1st Cir. 1997).

Finally, the government wholly misapprehends the petitioners' purpose in citing *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). That case, as the government states, holds that when a district court is deciding a motion for judgment as a matter of law under Fed. R. Civ. P. 50, it must draw all inferences in favor of the moving party and may not make credibility judgments. *Id.* at 150. Petitioners do not assert that *Reeves* is directly applicable here, Opp. 12. Instead, petitioners contend that when deciding a Rule 23(b) motion based on a juror's alleged refusal to follow the law, the district court should use the standard developed under Fed. R. Civ. P. 50 to analyze the record evidence and determine whether there is any "reasonable possibility" that the juror's position was due to his or her views on the merits of the case. That familiar approach would easily be administered by trial judges. Moreover, it essentially describes what the Second, D.C., and Ninth Circuits did in assessing the record evidence in *Thomas*, *Brown*, and *Symington* and best serves the constitutional interests embodied in Rule 23(b). To avoid intrusive probing, such an objective test is critical.

Here, any objective assessment of the record results in the conclusion that, at the very least, there was a "possibility" or a "reasonable possibility" that Juror Alfonso's position was based on her view of the merits of the government's case.

See Pet. 6-9. Plainly, the Eleventh Circuit did not require an objective treatment of the record to assess its ambiguity. Equally plainly, it authorized the district court to determine which jurors among the twelve were credible and which were not, making clear to the remaining jurors where the judge's sympathies lay. Finally, the court of appeals compounded these errors by affording only deferential clearly-erroneous review to the district court's subjective assessment of the record. This approach is wholly inconsistent with that taken by the Second, D.C., and Ninth Circuits, and that conflict warrants this Court's review.

c. Third, the government contends that the Eleventh Circuit's "substantial possibility" standard is the equivalent of the other circuits' "any possibility" and "any reasonable possibility" standards. The government correctly states that "it is always possible to speculate that a juror's position is based on the insufficiency of the government's evidence." Opp. 11. From this, the government, again correctly, concludes that the "any possibility" standard must encompass only possibilities that are not purely speculative. The government then posits that a "substantial possibility" is simply one that is not purely speculative, and triumphantly concludes that all of the standards are the same.

The problem lies in the last step of this syllogism. A substantial possibility encompasses a range of probabilities far broader than those that are merely "not speculative." A requirement that a record demonstrate a substantial possibility that the juror's position is based on his or her view of the evidence is certainly more demanding than a requirement that a record demonstrate any non-speculative possibility. But to move beyond semantic quibbling, the proof is in the pudding. This record is, at the least, patently ambiguous; several jurors subjectively believed that Juror Alfonso was following the court's instructions, while others did not. After re-instruction, all jurors testified that Juror Alfonso did not say that she did not have to follow the court's instructions; and Juror Alfonso

herself testified that she was following the law. See Pet. 7. The conclusion that this record reveals no "possibility" or "reasonable possibility" that Juror Alfonso's position was based on her view of the merits does not comport with a commonsense understanding of that standard.

This Court should grant the petition to resolve the conflict on the important federal questions presented by this case.

2. **The Tension With This Court's Decisions.** The government distinguishes *Tanner* v. *United States*, 483 U.S. 107 (1987), and *Brasfield* v. *United States*, 272 U.S. 448 (1926), by pointing out that the cases arose in different contexts – a point petitioners themselves made in describing the cases. The government simply ignores petitioners' actual point – that the analysis in these cases is utterly inconsistent with the Eleventh Circuit's authorization of the probe of jury deliberations and its affirmance of the dismissal of a deliberating juror based on the district court's subjective assessment of the record and lenient standard for discharge.

The government fails to respond to the argument that if an inquiry into the jury's numerical division is "coercive" and likely to exert "an improper influence upon the jury," *Brasfield*, 272 U.S. at 450, then *a fortiori*, interrogations of all jurors during deliberations about the statements and conduct of other jurors with respect to, and in the course of, those deliberations is coercive and improper. Nor does the government address the unmistakable implication of *Tanner* that inquiry into the internal deliberations of a jury is prohibited, which is essential to preservation of the secrecy of such deliberations. See Pet. 23-24. Finally, the government does not address the relationship between the rule adopted by the Eleventh Circuit and the purposes served by maintaining the secrecy of jury deliberations – to wit, the danger that disclosure poses to the deliberative process, *id.* at 24-25, and the influence of judicial questioning upon deliberations, *id.* at 25-26. This Court's decisions reflect that "long-recognized and very substantial concerns support the protection of jury

deliberations from intrusive inquiry," *Tanner*, 483 U.S. at 127. The Eleventh Circuit's interpretation of Rule 23(b) is indifferent to those concerns and their constitutional origin. The government's response – that those cases are not this case – does not address the principles underlying this Court's authority, let alone the force of those principles when applied in the context presented here.

3. **The Issue Presented Is Of National Importance.** The government does not dispute that the uniform, correct interpretation of Rule 23(b) is of central importance to the administration of justice and federal constitutional rights. Nor does the government deny that the issue of the proper test for dismissing a juror for alleged nullification arises with some frequency not only in the federal courts, but also in state courts. See Pet. 19 n.5.

The secrecy of jury deliberations and the accused's right to a unanimous verdict by an impartial verdict are both implicated by the erroneous rule of law adopted by the Eleventh Circuit in this case. A district court's temptation to a lenient approach to juror discharge may be great in light of increasing caseloads and the prospect of retrial; only a stringent application of Rule 23(b) can eliminate this incentive, and maintain public confidence in the secrecy of jury deliberations and their freedom from any appearance of judicial manipulation. Moreover, in light of the current conflict, only this Court can establish a uniform, bright-line rule that protects the fundamental constitutional interests at stake.

CONCLUSION

For the reasons set forth above and in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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